85-140

No. .....

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In The
Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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60 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g.* 403 F.Supp. 1199 (E.D.Va. 1975), which upheld the constitutionality of Virginia's sodomy statute, does not constitute precedent binding upon lower federal courts.

2. Whether the Court of Appeals erred in concluding that Georgia's sodomy statute infringes upon the fundamental rights of homosexuals and in requiring the State of Georgia to demonstrate a compelling state interest in order to support the constitutionality of the statute.

LIST OF PARTIES

Michael Hardwick and John and Mary Doe were the Plaintiffs in the United States District Court for the Northern District of Georgia. Michael J. Bowers, Attorney General of the State of Georgia, Lewis Slaton, District Attorney for Fulton County, Georgia and George Napper, Commissioner of Public Safety for the City of Atlanta were named as Defendants in this action.

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No. .....

In The

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MICHAEL J. BOWERS,
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v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Michael J. Bowers, Attorney General of the State of Georgia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 21, 1985.

OPINION BELOW

The opinion of the Court of Appeals appears at 760 F.2d 1202 (11th Cir. 1985). The opinion of the United States District Court for the Northern District of Georgia was not reported and appears in the Appendix hereto,

along with the opinion of the Court of Appeals and the Court of Appeal's denial of rehearing en banc.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 21, 1985. A timely suggestion for rehearing en banc was filed on May 30, 1985, and denied on June 13, 1985. This petition for certiorari is filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

Official Code of Georgia Annotated, Section 16-6-2(a) (1984).

> "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."

STATEMENT OF THE CASE

Respondents, Michael Hardwick and John and Mary Doe, filed their complaint in this case on February 14, 1983. Hardwick alleged that he was a practicing homosexual who regularly engages in private homosexual acts, and that he will do so in the future. The Does alleged that

they were lawfully married and had the ambition to engage in activities proscribed by the Georgia sodomy statute, O.C.G.A. § 16-6-2 (1984). The Respondents alleged that the statute was unconstitutional in that it violated their right of privacy under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that it violated due process of law, was unconstitutionally overbroad, and violated their freedom of expression and association. Respondents sought declaratory judgment to this effect.

Each Defendant, including Petitioner Bowers, filed separate motions to dismiss. The District Court, in an order entered by the Honorable Robert H. Hall, dismissed the complaint as to the Does on the basis of their lack of standing. As to Hardwick, the complaint was dismissed on the ground that all of his constitutional claims had been rejected by this Court in *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd* 425 U.S. 90 (1976).

Respondents appealed Judge Hall's decision to the United States Court of Appeals for the Eleventh Circuit and on May 21, 1985, in an opinion authored by the Honorable Frank M. Johnson, Circuit Judge, a majority of the panel found (1) that Hardwick possessed sufficient standing to pursue this action, while the Does lacked standing; (2) that this Court's summary affirmance in *Doe v. Commonwealth's Attorney, supra,* is not binding precedent; and (3) that Georgia's sodomy statute infringes upon Hardwick's fundamental constitutional right of privacy and that the State of Georgia would be required, upon the trial of the case, to establish the existence of a compel-

ling state interest in proscribing consensual homosexual sodomy.

The Honorable Phyllis A. Kravitch, Circuit Judge, filed a separate opinion concurring in part with the majority panel decision, but dissenting from the majority holding that *Doe v. Commonwealth's Attorney* is not binding on the lower federal courts.

On May 30, 1985, a suggestion for rehearing *en banc* was filed on behalf of Petitioner Bowers, and was denied on June 13, 1985.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly With The Decision Of The Court Of Appeals For The District Of Columbia In Dronenburg v. Zech, 741 F. 2d 388, Reh. Denied, 746 F.2d 1579 (D.C.Cir. 1984) By Erroneously Concluding That Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), Sum. Aff'g 403 F.Supp. 1199 (E.D. Va. 1975), Does Not Constitute Binding Precedent.

In *Doe v. Commonwealth's Attorney for the City of Richmond*, 407 F.Supp. 1199 (E.D. Va. 1975) a three judge district court upheld the constitutionality of Virginia's sodomy statute against allegations that the statute violated due process, freedom of expression, and the right of privacy as it related to homosexual conduct.

On appeal, the district court's decision was summarily affirmed by this Court. 425 U.S. 901 (1976). This sum-

mary affirmance formed the basis for Petitioner's motion to dismiss Respondent Hardwick's claims, which was granted by the district court.

The Court of Appeals for the Eleventh Circuit disagreed with the district court's decision and concluded that *Doe* is not binding precedent. While the Court of Appeals recognized that a summary affirmance by the Supreme Court has binding precedential effect, *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975), it decided that *Doe* was not binding since this Court " . . . could have approved the result reached by the district court without addressing the constitutional issues because the Plaintiffs in *Doe* plainly lacked standing to sue." *Hardwick v. Bowers,* 760 F.2d 1202, 1207 (11th Cir. 1985).

Additionally, the Court of Appeals determined that even if Doe's summary affirmance could have been considered a decision on the merits at one time, subsequent doctrinal developments have occurred which would release lower courts from the bonds of *Doe.*

The Court of Appeals concluded that two footnotes in this Court's decision in *Carey v. Population Services International,* 431 U.S. 678 n. 5, n. 17 (1977), and this Court's dismissal of the writ of certiorari in *New York v. Uplinger,* — U.S. —, 104 S.Ct. 2332 (1984) were indications that this court now considers the issue of privacy in the context of homosexual sodomy to be an open question, and fair game for lower court interpretations.

It is urged that the court of appeals has made unwarranted assumptions in its efforts to evade *Doe v. Commonwealth's Attorney.* These assumptions have resulted in a direct conflict with the Court of Appeals for the Dis-

trict of Columbia's decision in *Dronenburg v. Zech,* 741 F.2d 1388, 1392, *reh. denied,* 746 F.2d 1579 (1984). In a unanimous panel opinion authored by Circuit Judge Bork, that court found that the summary affirmance in *Doe v. Commonwealth's Attorney* was binding on the lower courts as a decision on the merits of the issues expressly ruled on by the district court.

As in the case *sub judice* it was urged in *Dronenburg* that *Doe* should be viewed not as an affirmance based upon the constitutionality of Virginia's sodomy statute, but rather upon the plaintiff's alleged lack of standing in the case. The *Dronenburg* court noted, however, that the three-judge district court made its decision on the merits of the constitutional claims, and not on standing, and further noted that the summary affirmance gave no indication that this Court "proceeded upon any other rationale." *Dronenburg,* 741 F.2d 1388, 1392. The court stated:

> Under these circumstances, we doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind.

Id. at 1392.

In addition, the *Dronenburg* opinion examined this Court's previous privacy decisions, ranging from *Griswold v. Connecticut,* 381 U.S. 479 (1965) to *Carey v. Population Services International,* 431 U.S. 678 (1977), and concluded as follows:

> . . . We do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The [Supreme] Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contracep-

> tion, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual conduct.

Id. at pp. 1395-96.

Thus, the District of Columbia Circuit Court was unable to discern doctrinal developments or any indications from this Court that the right of privacy may extend as far as is urged by the Respondents herein or as found by the Eleventh Circuit panel.

As Circuit Judge Kravitch indicated in her dissent from the decision below, this Court has made it clear that summary affirmances are decisions on the merits of a case and the lower courts are bound to follow summary decisions "until such time as the Court informs [them] that [they] are not" *Hicks v. Miranda,* 422 U.S. at 345-346, 95 S.Ct. at 2289 (quoting *Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir.) *cert. denied,* 414 U.S. 1096, 94 S.Ct. 732, 38 L.Ed.2d 555 (1973))." *Hardwick, supra* at 1214. (Kravitch, J., dissenting).

Moreover, Judge Kravitch correctly concluded that even if the perceived "doctrinal developments" of *Carey* and *Uplinger* might indicate a willingness on the part of this Court to reconsider the wisdom of *Doe,* the Court of Appeals is not free to ignore it as binding precedent.

As the Eleventh Circuit stated in *Jaffre v. Wallace,* 705 F.2d 1526 (11th Cir. 1983) *aff'd,* — U.S. —, 105 S.Ct. 2479 (1985):

> Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto v. Davis,* 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982). . . . Justice Rehnquist em-

> phasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be.' *Davis,* 45 U.S. at 375, 102 S.Ct. at 706. *See also, Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.,* [460] U.S. [533, 535] 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 1983). (The Supreme Court in a per curiam decision recently stated: "Needless to say, only this Court may overrule one of its precedents.")

Id. at 1532.

Petitioner maintains that the court below has failed to adhere to its own admonition in this case. In doing so it has created a direct conflict with another Circuit's ruling on the effect of *Doe v. Commonwealth's Attorney* on the present controversy. Its opinion is contrary to the weight of authority, since most federal courts which have had occasion to consider *Doe* have recognized it as binding and as limiting the constitutional right of privacy to heterosexual conduct. *See Beller v. Middendorf,* 632 F.2d 788, 809 (9th Cir. 1980). It is urged that this conflict, and the importance of the issues involved in this matter, warrant review by this Court.

II. The Court Below Erred In Concluding That Georgia's Sodomy Statute Infringes Upon Fundamental Constitutional Rights Of Homosexuals And By Requiring The State To Show A Compelling Interest To Support Its Constitutionality, Thus Raising Significant And Recurring Questions As To The Ability Of The States To Regulate Private Conduct.

In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973) this Court stated:

> Our prior decisions recognizing a right to privacy guaranted by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" [Citations omitted.] This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. [Citations omitted.]

Id. at 65.

It is urged that these traditional zones of protected privacy have not been enlarged in any subsequent decisions of this court. Even *Carey v. Population Services International, supra,* dealt with the individual's right to make decisions to prevent contraception. 431 U.S. at 688.

After recounting these zones of privacy, the lower court in the case *sub judice* perceived an analogy between the zone of marital intimacy and homosexual sodomy stating that "[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage." *Hardwick* at 122. The panel also concluded that the same privacy interests identified in *Stanley v. Georgia,* 394 U.S. 557 (1969) (the right to be free from governmental interference with the private possession of obscene material) are implicated in private consensual sodomy.

As noted by Judge Gabrielli in his dissenting opinion in *People v. Onofre,* 51 N.Y.2d 476, 415 N.E.2d 936, *cert. denied* 451 U.S. 987 (1980), decisions relating purely to sexual gratification have been subject to government regulation and proscription throughout the history of western civilization.

> Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of

> rape (43 Aquinas, *Summa Theologiae,* pp. 246-249 [Gilby ed.], 4 *Blackstone's Commentaries,* 215; see, generally, Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L.Rev. 1281, 1292-98). Indeed, as early as 1553 during the reign of Henry VIII, England enacted statutes prohibiting sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various states. . . . [I]t simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clauses of the Fifth and Fourteenth amendments.

Id. at 503-504, 4215 N.E.2d at 949 (Gabrielli, J., dissenting). In contrast, this Court in *Roe v. Wade,* 410 U.S. 113 (1973) in finding a limited right of privacy with respect to abortion decisions, conducted a historical review of ancient attitudes, and the common law and statutory laws of England and America, and concluded that at the time of the adoption of our Constitution, and through a major portion of the 19th Century, " . . . a woman enjoyed a substantially broader right to terminate pregnancy than she does in most states today." 410 U.S. at 140, 93 S.Ct. at 720. No similar right to engage in sodomy existed at the time of the adoption of our Constitution. It is therefore urged that sodomy of any kind, including that which perchance takes place in private, cannot be considered a fundamental right or implicit in the concept of ordered liberty. Such a right is not contemplated by the Constitution. *See generally, Paris Adult Theatre I, supra.*

Members of this Court have indicated that they would not go so far as the lower court has in this case. In *Carey, supra,* Justice White, in his concurring opinion, stated, "I do not regard the opinion, however, as declaring uncon-

stitutional any state law forbidding extra-marital relations." 431 U.S. at 702. Justice Powell, in his concurrence, rejected any view which would subject all state regulation affecting adult sexual relations to the strictest standard of review. "Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard wherever it implicates sexual freedom." 431 U.S. at 705. Justice Rehnquist, in a footnote to his dissent, referred to the fact that the facial constitutionality of sodomy statutes has "definitively" been established, citing *Doe v. Commonwealth's Attorney, supra.* 431 U.S. at 718, n. 2. (Rehnquist, J. dissenting)

Indeed the majority opinion in *Carey,* in footnote 5, expressly denied that it was holding that state laws must meet the compelling state interest test whenever sexual freedom is implicated, but only when they infringe upon an individual's decision to prevent conception or terminate pregnancy. 431 U.S. at 688, n. 5.

Justice Blackmun, in writing for the Court in *Roe v. Wade, supra,* recognized that the right of privacy is not absolute:

> In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). [Other citation omitted.]

This Court in *Paris Adult Theatre I, supra,* made it clear that the states do have the right to make unprovable

assumptions lacking in scientifically certain criteria, in order to protect a social interest in order and morality. "As Chief Justice Warren stated, there is a 'right of the nation and of the states to maintain a decent society. . . .'" *Paris Adult Theatre I v. Slaton,* 413 U.S. at 59-60, quoting *Jacobellis v. Ohio,* 378 U.S. 184, 199 (1964) (Warren, C. J. dissenting). Thus it was held that even though there might be no conclusive proof of a connection between antisocial behavior and obscene material, it was within the power of the General Assembly of Georgia to make that determination. The State of Georgia has made a similar conclusion with respect to sodomy.

Finally, the Court in *Dronenburg v. Zech,* 741 F.2d 1388, *reh. denied,* 746 F.2d 1579 (D.C. Cir. 1984) was unable to find any principle which would apply a right of privacy to homosexual conduct. 741 F.2d at 1395-96.

It is urged that the Eleventh Circuit's opinion purports to create a right of privacy where none has previously existed. It will substantially impede the ability of Georgia and her sister states to legislate in any area which touches upon moral issues. The decision below calls into question numerous statutes proscribing personal, private consensual conduct such as suicide, prostitution, polygamy, adultery, and fornication, *Paris Adult Theatre I v. Slaton, supra,* 413 U.S. at 69, 93 S.Ct. at 2641, n. 15, and those laws prohibiting the private possession and use of illegal drugs, such as marijuana. The decision raises significant questions relating to the relationships of government, the Constitution, state laws and individual actions which substantially impact on the traditional mores of this nation.

CONCLUSION

Petitioner shows that the decision below is erroneous and constitutes a precedent-setting error of exceptional importance. The Court of Appeals for the Eleventh Circuit has failed to follow binding precedent of this Court and has rendered an opinion in direct conflict with that of the Court of Appeals for the District of Columbia. *Dronenburg v. Zech,* 741 F.2d 388, *reh. denied,* 748 F.2d 1579 (D.C.Cir. 1984).

The lower court's opinion purports to create a new right under the federal Constitution which has never been recognized by this Court. In doing so, the lower court's opinion has substantially diminished the ability of the state to enact legislation having as its object the preservation of a decent and moral society. The effects of the opinion, if left to stand, will reach well beyond the issues presented herein. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

ORDER

(Filed April 18, 1983)

Plaintiffs, a male homosexual and a married couple, seek a declaratory judgment that Official Code of Georgia Annotated § 16-6-2 is unconstitutional, insofar as it makes consensual sodomy a crime. Plaintiffs allege that the statute violates their constitutional rights of privacy, due process, and freedom of expression and association. Defendants, Michael Bowers, Attorney General of Georgia, and Lewis Slaton, District Attorney of Fulton County, have filed motions to dismiss for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Additionally, it is argued that there is no justiciable controversy as to the married couple, the Does.

The statute in question provides in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .

As to plaintiffs Doe, the court must agree that their allegations do not create a justiciable controversy. The Does allege that they are a married couple who seek to engage in sexual activity proscribed by O.C.G.A. § 16-6-2 in the privacy of their home. Additionally, they allege that they have been chilled and deterred from engaging in the activity by the existence of the statute and the recent arrest of plaintiff Hardwick for sodomy under the statute. Hardwick's case, however, has not been presented to the grand jury, and the District Attorney's Office has stated that it will not be presented unless further evidence develops.

The Does do not allege that they have been threatened with prosecution or that any other married couple has been prosecuted or threatened with prosecution under the statute. Even though plaintiff Hardwick was arrested, he has not been prosecuted. Like the married couple in *Poe v. Ullman,* 367 U.S. 497, 505 (1961), the Does are unable to show that they have sustained or are in immediate danger of sustaining some direct injury as a result of the statute's enforcement. *See also Roe v. Wade,* 410 U.S. 113, 127-29 (1973).

As to plaintiff Hardwick, his arguments are foreclosed by the Supreme Court's affirmance of a three-judge district court decision upholding the constitutionality of the Virginia sodomy statute. *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd,* 425 U.S. 901 (1976). The Virginia statute challenged in that case is quite similar to the Georgia legisla-

tion in question here, and all the constitutional arguments made by Hardwick here were rejected in Doe.

For these reasons, the motions to dismiss are GRANTED.

So ORDERED this 15th day of April, 1983.

/s/ Robert H. Hall
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

JUDGMENT ON DECISION BY THE COURT
FOR THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

Civil Action Docket No. C83-273A

MICHAEL HARDWICK

Plaintiff,

vs.

JOHN DOE, MARY DOE, MICHAEL BOWERS,
Attorney General, LEWIS SLATON, et al

Defendants.

JUDGMENT

This action came on for (hearing) before the court, United States District Judge ROBERT H. HALL presiding. The issues having been duly tried (heard) and a decision having been duly rendered, granting defendants' motions for summary judgment, IT IS ORDERED AND ADJUDGED that the plaintiff, MICHAEL HARDWICK take nothing, that action be dismissed and that the defendants recover their costs of Action———————

Dated at: Atlanta, Georgia
Filed and entered in the
Clerk's office: 4/22/82
BEN H. CARTER, CLERK
By /s/ Danny Brown

Date: April 22, 1983

BEN H. CARTER, CLERK
By /s/ Danny Brown
Deputy Clerk of the Court

APPENDIX "C"

Michael HARDWICK, et al.,

Plaintiffs-Appellants,

vs.

Michael BOWERS, et al.,

Defendants-Appellees.

No. 83-8378.

United States Court of Appeals,
Eleventh Circuit.

May 21, 1985.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

The Atlanta Police arrested Michael Hardwick on August 3, 1982, because he had committed the crime of sodomy with a consenting male adult in the bedroom of his own home. Charges were brought as a result of the arrest and after a hearing in the Municipal Court of Atlanta Hardwick was bound over to the Superior Court. At that point the District Attorney's office decided not to present the case to the grand jury unless further evidence developed.

Hardwick then filed this suit asking the federal district court to declare unconstitutional the Georgia statute that

criminalizes sodomy, O.C.G.A. § 16-6-2 (1984).[1] Hardwick alleged in his complaint that he is a practicing homosexual who regularly engages in private homosexual acts and will do so in the future. He was joined in bringing the suit by John and Mary Doe, a married couple acquainted with Hardwick. They claimed that they desired to engage in sexual activity proscribed by the statute but had been "chilled and deterred" by the existence of the statute and the recent arrest of Hardwick.

The complaint named as defendants Michael Bowers, Attorney General of Georgia; Lewis Slaton, District Attorney for Fulton County; and George Napper, Public Safety Commissioner of Atlanta. All three filed a motion to dismiss for failure to state a claim upon which relief could be granted.

The district court granted the motion. It ruled that the Does did not have standing to bring suit and that Hardwick, although he possessed standing, had no legal claim in light of the Supreme Court's summary affirmance of a three-judge district court in *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47

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1. Section 16-6-2 provides as follows:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment of not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

L.Ed.2d 751 (1976), *aff'g*, 403 F.Supp. 1199 (E.D.Va.1975). All three plaintiffs have appealed the dismissal.

I. STANDING

[1, 2] A federal court may not hear a legal claim unless it arises from a genuine case or controversy. A case or controversy requires a plaintiff with a personal stake in the outcome sufficient to assure an adversarial presentation of the case. Hence, a plaintiff must demonstrate that he or she has suffered an actual or threatened injury caused by the challenged conduct of the defendant. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir.1983).[2]

[3] The State is not currently prosecuting Hardwick or the Does under the sodomy statute. The Does have never been arrested under the statute and Hardwick cannot rely solely on his past arrest to confer upon him standing to challenge the constitutionality of the statute. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). This suit, therefore, presents an

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2. The defendants do not dispute that the enforcement of this statute causes the injury alleged by Hardwick and the Does or that the requested declaratory judgment would likely redress their injuries. *Simon v. Eastern Kentucky Welfare Rights Organzation*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); Nor do they suggest any prudential reasons for this court to refuse to hear the case. See *Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). But see note 3, infra.

anticipatory challenge to the statute. The standing of each of the plaintiffs will depend on whether the threat of prosecution under this statute is real and immediate or "imaginary" and "speculative." *Steffel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974).

A court can estimate the likelihood of prosecution by examining the identity and interests of each of the parties. The interest of the State in enforcing the statute, along with past enforcement patterns, provides one indication; the interest of the plaintiff in engaging in the prohibited activity provides another. *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 818 (5th Cir.1979).[3]

[4] The interest of the State in prosecuting these plaintiffs need not take the form of a specific threat of prosecution against them individually, although such a threat will often suffice to give a plaintiff standing. *Steffel v. Thompson, supra.* A general threat of prosecution against an identifiable group may confer standing in some instances. For instance, in *Lake Carriers' Association v. MacMullan,* 406 U.S. 498, 508, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972), the Court ruled that a group of bulk cargo vessel owners had standing to challenge a state law, about to go into effect, mandating certain sewage dis-

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3. The court in *ISKCON v. Eaves* concluded that the plaintiff's interest in violating the statute determined the Article III component of standing, while the State's enforcement interest bore relevance only to the "prudential" aspect of the standing doctrine. This distinction does not influence our analysis of the standing of these plaintiffs, for we consider standing in both the constitutional and prudential senses.

posal methods for cargo vessels. Even though the State had threatened no particular owner with prosecution under the statute, it announced that it would prosecute violators as soon as the statute became effective.

[5] The past enforcement of the statute against Hardwick is especially significant in measuring the State's intentions of prosecuting him in the future. Hardwick alleges that his arrest resulted from a situation in which he regularly places himself, one that will recur often in the future. As this Court recognized in *Cuidadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 820 (5th Cir.1980), *cert. denied*, 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981), evidence of past injuries inflicted by the State raises the strong inference that future injuries will appear. A past enforcement effort often will confirm the reasonableness of a plaintiff's subjective fear of prosecution. This is particularly true in Hardwick's case if one accepts as true[4] his allegation that the Atlanta Police enforce the statute in a way that places all practicing homosexuals in imminent danger of arrest.

A second indicator of threatened harm to these plaintiffs come from the nature of their interest in violating the statute. Each of them claims that their normal course of activity will lead them to violate the statute, completely apart from their desire to have it invalidated. Hardwick status as a homosexual adds special credence to his claim.

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4. Because Hardwick appeals from a dismissal for failure to state a claim upon which relief can be granted, the allegations of his complaint must be taken as true. The same holds true for the Does, whose complaint was dismissed for lack of subject matter jurisdiction before the defendants filed any answer.

See International Society for Krishna Consciousness v. Eaves, supra, at 819. While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.

In some cases, the authentic interest of the plaintiff in engaging in the prohibited conduct can establish standing even though the only threat of enforcement by the State comes from the very existence of the statute. The Supreme Court in *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 302-03, 99 S.Ct. 2301, 2310-11, 60 L.Ed.2d 895 (1979), held that a union could challenge a state law prohibiting deceptive advertising relating to farm products because the union planned to sponsor advertising campaigns in the future and the State had not disavowed any intention of enforcing the statute. The risk that the State would detect the inadvertent use of an inaccuracy in an advertisement by the union and would prosecute for that offense was a threat immediate enough to give the union standing. *See also Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (doctor who consulted with pregnant women regarding birth control in violation of law was "one of those against whom these criminal statutes directly operate"); *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (teacher challenging statute prohibiting teaching of evolution). A plaintiff has a stronger claim for standing if, in addition to the authencity of the interest, he or she is best suited to challenege a law. *Atlanta Gas Light Company v. United States Department of Energy,* 666 F.2d 1359, 1364 n. 7 (11th Cir.),

cert. denied, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 78 (1982).

[6] The past arrest of Hardwick, combined with the continuing resolve on the part of the State to enforce the sodomy statute against homosexuals and the authenticity of Hardwick's desire to engage in the proscribed activity in the future, leads us to agree with the district court that Hardwick has standing to bring this lawsuit. The issue of the Does' standing is less straightforward. They have not been arrested or threatened with arrest for sodomy. At first glance, they appear to be in the same position as several of the plaintiffs in *Younger v. Harris,* 401 U.S. 37, 40-42, 91 S.Ct. 746, 748-749, 27 L.Ed.2d 669 (1971), who intervened in a federal suit filed by an acquaintance who had been prosecuted by the state under a criminal syndicalism law. The intervenors, teachers, alleged that the existence of the statute and the prosecution of Harris had "inhibited" their teaching and had left them "uncertain" as to their legal rights. The Court ruled that the intervenors had no standing.

The Does argue that they do not stand in precisely the same position as the intervenors in *Younger* because the defendants in that case brought their appeal after the entry of final judgment in the three-judge district court. The intervenors had been given an opportunity to present evidence of a realistic probability of prosecution apart from their unsupported fears; they had presented no such evidence. The Does, on the other hand, have not had an opportunity to engage in discovery and to present evidence relating to the enforcement of this statute against married couples.

The lack of evidence related to threat of injury should in many cases lead a court to permit discovery and to make factual findings before dismissing a suit for lack of standing. *Cf. Chancery Clerk of Chickasaw County, Mississippi v. Wallace,* 646 F.2d 151, 159 (5th Cir. Unit A 1981); *City of Waco v. Environmental Protection Agency,* 620 F.2d 84 (5th Cir.1980). The Does, however, did not allege in their complaint that they faced a serious risk of prosecution. They stated only that the existence of the statute along with the arrest of Hardwick had "chilled and deterred" them and had "interfered" with decisions regarding their private lives. In resisting the defendants' motion to dismiss for lack of standing, the Does never claimed membership in a group especially likely to be prosecuted. Throughout the proceedings in the district court, including the motion for reconsideration of the judgment, the Does claimed that the existence of the statute, its literal applicability to their situation, and the refusal of the State to disavow any intent to prosecute them combined to give them standing. At no time before this appeal did they request discovery or an evidentiary hearing to determine the likelihood of future prosecution; they filed no affidavit to establish any realistic threat. Under these circumstances, *Younger v. Harris, supra,* controls and we affirm the district court's dismissal of the Does' complaint for lack of standing. *Cf. Poe v. Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

II. THE EFFECT OF *DOE V. COMMONWEALTH'S ATTORNEY*

In 1975 a three-judge district court in Virginia upheld the constitutionality of that state's sodomy law, *Doe v. Commonwealth's Attorney for City of Richmond,* 403

F.Supp. 1199 (E.D.Va.1975). The plaintiffs, homosexuals who had neither been arrested nor threatened with prosecution, argued that the statute violated their rights to due process, freedom of expression, privacy, and freedom from cruel and unusual punishment. They appealed the adverse decision of the district court to the Supreme Court. The Court summarily affirmed the judgment. 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). The district court in this case dismissed Hardwick's complaint for failure to state a claim upon which relief could be granted, relying exclusively on *Doe*.

A. The Bounds of the Original Holding in *Doe*

[7] A summary affirmance of the Supreme Court has binding precedential effect. *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). Yet because the Court disposes of the case without explaining its reasons, the holding must be carefully limited. A summary affirmance represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court. *Mandel v. Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); *Fusari v. Steinberg,* 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975).

Despite this general admonition, finding the precise limits of a summary affirmance has proven to be no easy task. Courts seeking to identify the issues governed by a summary affirmance should examine the issues necessarily decided in reaching the result as well as the issues mentioned in the jurisdictional statement. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 181-83, 99 S.Ct. 983, 988-89, 59 L.Ed.2d 230 (1979). These two

criteria conflict in this case. The jurisdictional statement in *Doe* presented the question of whether Virginia's sodomy statute violated constitutional rights to privacy, due process, and equal protection under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Yet the Court could have approved of the result reached by the district court without addressing those constitutional issues because the plaintiffs in *Doe* plainly lacked standing to sue.[5] Hence,

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5. The plaintiffs there had not been arrested for violation of the statute, nor did they present any evidence of threatened prosecutions or past prosecutions under the statute. At most, the plaintiffs had a "generalized grievance" regarding the statute and its enforcement that was insufficient to allow a federal court to reach the merits of their claim. Cf. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

The fact that the Supreme Court in *Doe* affirmed a dismissal on the merits below rather than vacating the judgment with instructions to dismiss for lack of subject matter jurisdiction does not demonstrate that the court reached the merits of the case. While an appellate court that finds lack of standing normally will vacate the judgment and remand for dismissal, the Supreme Court has not uniformly followed that course. *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (reversing decision on the merits due to lack of Article III standing); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (same). Moreover, the Court would be even less likely to vacate the judgment and remand for dismissal when a case presents prudential standing problems which, unlike constitutional standing requirements, do not bear on the very power of the court to hear the case. *Warth v. Seldin*, 422 U.S. 490, 499-501, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975) ("reluctance to exert judicial power" due to prudential standing problems may be overcome by countervailing factors). The facts as described by the district court in *Doe* presented what appeared to be non-

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the constitutional issues presented in *Doe* were issues listed in the jurisdictional statement but not necessary to the disposition of that case.

Several reasons lead us to conclude that the mention of constitutional issues in the jurisdictional statement in *Doe* does not override the clear availability of a narrower ground of decision. To begin with, the Supreme Court has generally referred to the two indicia, necessity to the deci-

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constitutional standing problems. Cf. *Schlesinger v. Reservists Committee to Stop the War, supra; Poe v. Ullman, supra.*

Similar reasoning applies to appellate jurisdiction. The special jurisdictional provisions of 28 U.S.C.A. § 1253 (1966) confer appellate jurisdiction on the Supreme Court only when a three-judge court was properly convened. Therefore the Supreme Court will often dismiss the appeal and vacate the judgment below if the three-judge court dismissed the case due to a plaintiff's lack of constitutional standing. *Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974). However, the Supreme Court has not held that it lacks appellate jurisdiction over an appeal from a dismissal on the merits by a three-judge court where the plaintiff lacks standing. Moreover, a three-judge court may be properly convened even when it could possibly decide the case on non-constitutional grounds. *Alexander v. Fioto,* 430 U.S. 634, 97 S.Ct. 1345, 51 L.Ed.2d 694 (1977); *Philbrook v. Glodgett,* 421 U.S. 707, 712, 95 S.Ct. 1893, 1897, 44 L.Ed.2d 525 (1975). The Supreme Court could therefore affirm a dismissal by a three-judge court if prudential standing problems hindered the court from hearing the merits; dismissal for lack of appellate jurisdiction would not be necessary.

The court in *Poe v. Ullman, supra,* dismissed the appeal rather than affirming the dismissal below because the plaintiffs there appealed from state court pursuant to 28 U.S.C.A. § 1257 (1966). The Supreme Court refused to hear the merits because of prudential considerations binding only on federal courts. Since the state court had not faced the same bar to adjudication on the merits, dismissal of the appeal was the proper disposition.

sion and presentation in the jurisdictional statement, as if both were necessary. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 499, 101 S.Ct. 2882, 2888, 69 L.Ed.2d 800 (1981) (summary affirmance binding as to "precise issues presented *and* necessarily decided") (emphasis supplied); *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 182-83, 99 S.Ct. at 989-90; *Mandel v. Bradley, supra,* 432 U.S. at 176, 97 S.Ct. at 2240; *see also Cherry v. Steiner,* 716 F.2d 687, 690 (9th Cir.1983), *cert. denied,* — U.S. —, 194 S.Ct. 1719, 80 L.Ed.2d 190 (1984). Furthermore, if the jurisdictional statement could expand a summary affirmance beyond the scope of issues necessarily decided, it would give the litigants considerable control over the scope of summary dispositions. While a jurisdictional statement prevents speculation as to what issues the Court actually considered, *see Howell v. Jones,* 516 F.2d 53, 56 (5th Cir. 1975), *cert. denied,* 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed.2d 321 (1976), it is only a tool in determining the ultimate question: the most narrow plausible rationale for the summary decision.

[8, 9] Lower courts may rely upon the jurisdictional statement as an outside limit on the precential scope of a summary decision but Supreme Court precedent does not allow us to consider the jurisdictional statement as both a minimum and a maximum formulation of the issues decided. Where, as in the *Doe* case, the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground. We therefore construe *Doe* as an affirmance based on the plaintiffs' lack of standing and not controlling in this case.

B. Doctrinal Developments after *Doe*

[10] Even if *Doe* had been resolved on the constitutional grounds now asserted by Hardwick[6] the Supreme Court has indicated since that time that the constitutionality of statutes such as the one in question here is not governed by *Doe* but, rather, remains an open question. Since a summary disposition binds lower courts only until the Supreme Court indicates otherwise, *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 St.Ct. 2281, 2289-90, 45 L.Ed.2d 223 (1975), developments subsequent to the *Doe* decision undermine whatever controlling weight it once may have possessed.

[11] Doctrinal developments need not take the form of an outright reversal of the earlier case. The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent. *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984); *Browder v. Gayle*, 142 F.Supp. 707 (M.D.Ala.) (three-judge court), *aff'd per curiam*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956). Even less clear-cut expressions by the Supreme Court can erode an earlier summary disposition because summary actions by the Court do not carry the full precedential weight of a decision announced in a written opinion after consideration of briefs and oral argument. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500, 101 S.Ct. 2882, 2888,

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6. The *Doe* affirmance could not control all of Hardwick's legal claims. He alleges that the Georgia statute violates his First Amendment freedom of association, a claim not addressed by the jurisdictional statement or the district court opinion in *Doe*.

69 L.Ed.2d 800 (1981); *Edelman v. Jordan,* 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974). The Court could suggest that a legal issue once thought to be settled by a summary action should now be treated as an open question, and it could do so without directly mentioning the earlier case. At that point, lower courts could appropriately reach their own conclusions on the merits of the issue. *Lecates v. Justice of the Peace Court No. 4 of Delaware,* 637 F.2d 898 (3d Cir.1980).

At least two actions by the Supreme Court demonstrate that it now considers the constitutional issues purportedly determined in *Doe* to be unsettled. The first indication came in the decision in *Carey v. Population Services,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The Court there held, *inter alia,* that a state could not prevent the sale of non-prescription contraceptives to adults by persons other than licensed pharmacists. Justice Powell stated in a concurring opinion that the majority had employed an unnecessarily broad principle that subjected all state regulation affecting "adult sexual relations" or "personal decisions in matters of sex" to the strictest standard of judicial review. The majority responded in footnote 5 that its holding only applied to state regulation that burdens an individual's right to decide to prevent conception by substantially limiting access to the means of effectuating that decision. It then went on to state the following: "As we observe below, 'the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' n. 17, *infra,* and we do not purport to answer that question now" (brackets in original). Footnote 17, although joined only by

a plurality, casts some light on the nature of the "private consensual sexual behavior among adults" referred to in footnote 5 because it cites a law review comment[7] that discusses the possible application of Supreme Court precedent to criminal statutes outlawing private consensual sexual activities, including sodomy. Justice Rehnquist, in a dissenting opinion, criticized the language of footnote 5 because he considered it to be in conflict with *Doe,* which in his view had definitively established the constitutional validity of state prohibitions of certain consensual activities.

The implications of footnote 5 could hardly be clearer. The plain meaning of the phrase "private consensual sexual behavior among adults" encompasses acts of sodomy carried out between consenting adults in private. The identical phrase in footnote 17 is accompanied by a reference to just that sort of activity. The ability of the state to regulate conduct as Georgia has attempted to do, according to the Court in *Carey,* is now an open question. Obviously *Carey* does not provide much guidance as to the proper analysis of the constitutional claims presented in this case; just as obviously, it calls on lower courts to analyze such claims rather than relying on *Doe.*

A second development in the Supreme Court occurred more recently when the Court granted certiorari in *New York v. Uplinger,* —— U.S. ——, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983), and later dismissed the writ as improvidently granted, 104 S.Ct. 2332 (1984). The New York Court of Appeals had ruled in that case that federal constitutional

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7. Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L.Rev. 670, 719-738 (1973).

law invalidated a New York statute prohibiting persons from loitering in a public place for the purpose of engaging or soliciting another person to engage, in "deviate sexual behavior." The decision was premised on an earlier ruling by that court in *People v. Onofre,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied,* 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981), where it held that the federal constitution invalidated a state statute criminalizing any act of sodomy between two persons. Hence, the petitioner for writ of certiorari in *Uplinger* urged the Supreme Court to consider the constitutionality of state regulations prohibiting consensual sodomy among adults.

After the Supreme Court received the briefs of the parties and heard oral argument in *Uplinger,* it dismissed the writ of certiorari as improvidently granted. In a per curiam order, the Court stated that the case presented an "inappropriate vehicle" for resolving the "important constitutional issues" raised by the parties. The Court also indicated that the constitutionality of state laws against consensual sodomy was one of the most important of those issues; it explained that several impediments to consideration of the constitutional issues presented in the *Onofre* decision figured heavily in its decision to dismiss the writ. Those impediments included the belated decision of the petitioner not to challenge the *Onofre* decision and the fact that the state court decision in *Uplinger* was subject to varying interpretations, leaving uncertainty as to the precise federal constitutional issue the state court decided.

[12, 13] It is fair to conclude from this order that the Supreme Court was prepared to address the constitutionality of state regulations like Georgia's sodomy sta-

tute but chose to address the issue when presented more directly in another case.[8] While the Court may have meant that it was prepared to reconsider the *Doe* affirmance, which would have remained binding precedent until overruled, such a possibility is unlikely because the Court never referred to *Doe* in the *Uplinger* proceedings or indicated in any way that the underlying constitutional issue was settled, even temporarily.[9] Under these circumstances, we interpret the order as an indication that the constitutional questions presented by Hardwick are still open for consideration by the Supreme Court and by this Court. This order, together with the Court's observation in *Carey*, deprives *Doe v. Commonwealth's Attorney* of whatever controlling weight it once may have had. The district court erred in dismissing Hardwick's claim.

III. CONSTITUTIONAL STANDARDS

[14] Despite the fact that the district court erred in relying on *Doe v. Commonwealth's Attorney*, we still con-

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8. The denial of a petition for writ of certiorari generally has no precedential value. *Hughes Tool Co. v. Transworld Air Lines, Inc.*, 409 U.S. 363, 366 n. 1, 93 S.Ct. 647, 650 n. 1, 34 L.Ed.2d 577 (1973). In this case, however, the Court granted certiorari, considered the briefs, heard oral argument, and dismissed the writ after explaining its reasons. We may draw appropriate inferences from such an order. *See Brown v. Allen*, 344 U.S. 443, 489-97, 73 S.Ct. 397, 437-41, 97 L.Ed. 469 (1953).

9. Contrary to the assertion of the dissent, we do not imply that the Supreme Court intended *Uplinger* to be a vehicle for overruling *Doe*. The dismissal in *Uplinger* suggests only that the court intended to consider the constitutional issue and resolve it one way or the other. Hence, speculation as to the views of the dissenting justices in *Uplinger* regarding the merits of that case does not influence our reading of the per curiam opinion.

front the question of whether the appellees were entitled to dismissal as a matter of law on some other ground. *Smith v. Phillips,* 455 U.S. 209, 215 n. 6, 102 S.Ct. 940, 945 n. 6, 71 L.Ed.2d 78 (1982). In particular, the judgment below could stand if we were to conclude that the statute in question is subject to minimal judicial scrutiny and that the appellants could not under any set of facts prove that the statute is not rationally related to the State's regulatory interest. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

Such is not the case here. The Georgia sodomy statute infringes upon the fundamental constitutional rights of Michael Hardwick. On remand, the State must demonstrate a compelling interest in restricting this right and must show that the sodomy statute is a properly restrained method of safeguarding its interests. *Cf. Dike v. School Board of Orange County, Florida,* 650 F.2d 783, 787 (5th Cir. Unit B 1981).

[15] The Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society. These include the decision whether to conceive and bear a child, *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Roe v. Wade,* 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), and decisions affecting certain intimate relationships such as marriage, *Zablocki*

v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), and other familial ties, *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Dike v. School Board of Orange County, Florida,* 650 F 2d 783 (5th Cir. Unit B 1981).

While the constitutional source of these limitations of the power of the State has been termed the "right to privacy," it is not limited to conduct that takes place strictly in private. Some personal decisions affect an individual's life so keenly that the right to privacy prohibits state interference even though the decisions could have significant public consequences. For instance, the direction of a child's education will have profound public consequences, yet under the Constitution a parent retains authority to direct his or her child's education. *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Stough v. Crenshaw County Board of Education,* 744 F.2d 1479 (11th Cir.1984). Similarly, a state has an interest in assuring the physical health of its citizens by regulating or forbidding certain medical procedures, but that interest gives way when a woman in the early stages of pregnancy chooses not to have a child. *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

Hardwick desires to engage privately in sexual activity with another consenting adult. Although this behavior is not procreative, it does involve important associational interests. The Supreme Court has indicated in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510

(1965), and *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), that the intimate associations protected by the Constitution are not limited to those with a procreative purpose. The Court in *Griswold* struck down a state law prohibiting the use of contraceptives because it unduly interfered with the sanctity of the marriage relationship. One component of that relationship is the decision whether to beget and bear children. *Carey v. Population Services International,* 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). But the marital relationship is also significant because of the unsurpassed opportunity for mutual support and self-expression that it provides. As the *Griswold* Court stated, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes . . . ." 381 U.S. at 486, 85 S.Ct. at 1682, *See also Zablocki v. Redhail,* 434 U.S. 374, 385-86, 98 S.Ct. 673, 680-81, 54 L.Ed.2d 618 (1978) (listing "associational interests" and procreation as separate interests protected by right to marry).

The intimate association protected against state interference does not exist in the marriage relationship alone. In *Eisenstadt v. Baird, supra,* the Supreme Court held that prohibiting the distribution of contraceptives to unmarried persons was unconstitutional because it treated married and unmarried individuals differently. The benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage.

In addition to the resemblance between Hardwick's conduct and the intimate association of marriage, we pay

heed to the fact that he plans to carry out his sexual activity in private. The right to privacy extends to some activities that would not normally merit constitutional protection simply because those activities take on added significance under certain limited circumstances. In particular, the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home. *Payton v. New York,* 445 U.S. 573, 589-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980).

In *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), police officers executing a valid search warrant found some obscene films in Stanley's home and he was charged with possession of obscene material. The Supreme Court ruled that a state could not make the private possession of obscene material a crime. Although a state may regulate obscenity when such material is distributed or displayed in public, it may not prohibit strictly private uses of obscenity: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home . . . . Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley's First Amendment interests, while not sufficient to allow the viewing of obscene material in public, prevented the State from deciding what he could view in private. Thus, the element of privacy deepened Stanley's interests and limited the possible purposes of state regulation. *See also Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality) (city may not prohibit family members from living together; Justice Stevens concurs on ground that ordinance directed

at internal composition of home lies beyond city's zoning power).

This case presents a person asserting an interest at least as substantial as the one in *Stanley v. Georgia.* In both cases, the fact that the activity is carried out in seclusion bolsters its significance. This is not a case involving sexual activity with children or with persons who are coerced either through physical force or commercial inducement. The absence of any such public ramifications in this case plays a prominent part in our consideration of Hardwick's legal claim.

In sum, the Supreme Court's analysis of the right to privacy in *Griswold v. Connecticut, supra, Eisenstadt v. Baird, supra,* and *Stanley v. Georgia, supra,* leads us to conclude that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. Such a right is protected by the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 486-94, 85 S.Ct. 1678, 1682-87, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring), and the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment. *Roe v. Wade,* 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973). We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest.

REVERSED and REMANDED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that Hardwick has standing to challenge the constitutionality of the Georgia sodomy statute, but that the Does lack standing. I therefore concur in Part I of the majority opinion.

I must dissent from Part II of the majority opinion, however, because I believe that neither the court below nor this court has the authority to reach and decide the merits of Hardwick's constitutional claims.[1] The United States Supreme Court, in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), summarily affirmed the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute nearly identical to Georgia's.[2] I find unpersuasive

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1. For this reason, I would not address the constitutional issues discussed in Part III of the majority opinion. If I thought that this court were empowered to reach those issues, however, I would agree with the majority that the Georgia sodomy statute should be tested under the "compelling interest" analysis set out in *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

2. The Georgia sodomy statute, O.C.G.A. § 16-6-2 (1984), provides, in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years. . . .

The Virginia statute at issue in *Doe v. Commonwealth's Attorney*, Va.Code § 18.1-212 (1950), provided, in pertinent part:

> Crimes against nature.—If any person shall . . . carnally know any male or female person by the anus

(Continued on following page)

the arguments advanced by the majority for declining to follow *Doe v Commonwealth's Attorney.* Therefore, I would affirm the district court's dismissal of Hardwick's complaint for failure to state a claim upon which relief could be granted.

I.

As the majority acknowledges, a summary affirmance by the Supreme Court has binding precedential effect. *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). Nevertheless, the majority holds that *Doe v. Commonwealth's Attorney* is not entitled to precedential weight because the summary affirmance might have been based on lack of standing, rather than on the merits of the constitutional issues involved.

Contrary to the majority's suggestion, we are not free to speculate that the summary affirmance in *Doe v. Commonwealth's Attorney* might have been based on lack of standing. First, the Supreme Court's discussion of summary affirmances in *Hicks v. Miranda* forecloses such speculation:

> As Mr. Justice Brennan once observed, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes *on the merits of a case . . .," Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959) . . . .

(Continued from previous page)

or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

Id. at 344, 95 S.Ct. at 2289 (emphasis added); *see also* 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶ 400.05-1, at 4-25 (2d ed. 1982) ("[S]ummary affirmances of lower federal court judgments . . . are decisions *on the merits,* and are binding on lower courts, in spite of the fact that such dispositions are made on the basis of the appellant's jurisdictional statement and the appellee's motion to dismiss or affirm, without oral argument or full briefs on the merits." (emphasis added)); C. Wright, Law of Federal Courts 757-58 (4th ed. 1983) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition *on the merits.*" (emphasis added; footnote omitted)).

Second, the jurisdictional statement in *Doe v. Commonwealth's Attorney* mentioned the substantive constitutional issues involved in the case, but did not mention the issue of standing.[3] The Supreme Court has held that the jurisdictional statement limits the range of permissible lower court interpretations of a summary disposition. *See McCarthy v. Philadelphia Civil Service Comm'n,* 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976); *Colorado Springs Amusements, Ltd. v. Rizzo,* 428 U.S. 913, 920 n. 6, 96 S.Ct. 3228, 3232 n. 6, 49 L.Ed.2d 1222 (1976) (Brennan, J., dissenting from denial of certiorari).

Third, and most conclusively, if the Supreme Court had decided that the plaintiffs in *Doe v. Commonwealth's*

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3. Nor did the opinion of the three-judge district court mention the issue of standing. The opinion clearly reveals that the district court decided the case on the merits. *See Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199, 1200-03 (E.D.Va.1975).

Attorney lacked standing, the Court *would not have had jurisdiction to decide the case.* Therefore, the Court would have had to *dismiss the appeal,* instead of summarily affirming the judgment of the court below.[4] This would be the necessary result whether the lack of standing was the result of Article III case-or-controversy considerations,[5] or of purely prudential concerns.[6] In my view, the majority fails to address adequately this crucial distinction.

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4. It must be remembered that the judgment of the district court in *Doe v. Commonwealth's Attorney,* which is what the Supreme Court summarily affirmed, was a judgment *on the merits. See supra* note 3.

   The majority cites *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), and *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), for the proposition that the Supreme Court does not always vacate the judgment below and remand for dismissal when the Court finds that the plaintiffs lacked standing. I do not quarrel with the majority's proposition. The crucial issue, however, is whether the Court could have summarily affirmed, on the basis of lack of standing, the lower court's decision in *Doe v. Commonwealth's Attorney,* or whether dismissal of the appeal would have been the required course. In *Rizzo* and *O'Shea,* the Supreme Court *reversed* a lower court decision rendered on the merits in favor of the *plaintiffs.* Other than the majority's interpretation of *Doe v. Commonwealth's Attorney,* it has failed to cite a single instance in which the Court has *affirmed,* on the basis of lack of standing, a lower court decision rendered on the merits in favor of the *defendants.*

5. *See Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, *determining the power of the court to entertain the suit.*" emphasis added)).

6. *See, e.g., Poe v. Ullman,* 367 U.S. 497, 509, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961) (dismissing appeal because of prudential, rather than Article III, standing considerations).

I thus disagree with the majority's conclusion that the Supreme Court in *Doe v. Commonwealth's Attorney* might not have reached the merits of the case. Like all summary affirmances, *Doe v. Commonwealth's Attorney* constitutes a decision on the merits, and, in the words of the Supreme Court, "the lower courts are bound by summary decisions 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. at 345-46, 95 S.Ct. at 2289 (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096, 94 S.Ct. 732, 38 L.Ed.2d 555 (1973)).

II.

The majority also holds that, even if *Doe v. Commonwealth's Attorney* had binding precedential effect when it was decided, such effect has been undermined by recent doctrinal developments. In particular, the majority argues that two footnotes in *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), and the dismissal of the writ of certiorari in *New York v. Uplinger*, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984), indicate that the Supreme Court is now willing to reverse or reconsider *Doe v. Commonwealth's Attorney*. I respectfully disagree.

In footnotes 5 and 17 in *Carey* the Supreme Court noted that "the Court has not definitively answered the difficult question whether and to what extent the constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey*, 431 U.S. at 688 n. 5, 97 S.Ct. at 2018 n. 5; *id.* at 694 n. 17, 97 S.Ct. at 2021 n. 17. I do not read this statement as a retreat from *Doe v. Commonwealth's Attorney*. On its face, the statement

simply acknowledges the fact that the Court has not yet passed on the validity of many kinds of state statutes regulating sexual conduct.[7] The statement does *not* purport to overrule those cases such as *Doe v. Commonwealth's Attorney* in which the Court *has* passed on the validity of other such state statutes.[8]

It is clear from the context in which footnotes 5 and 17 appear in the *Carey* opinion that the majority's interpretation of those footnotes is erroneous. The plaintiffs in *Carey* argued that a New York law regulating the sale and distribution of contraceptives violated their right of privacy because the law infringed on their right to engage in "private consensual sexual behavior." The Supreme Court decided the case instead on a more narrow ground, however, and footnotes 5 and 17 constitute the Court's explanation for declining to adopt the plaintiffs' broad right of privacy argument. In effect, the Court was saying, "we have not extended the right of privacy as far as the plaintiffs would like." The Court was *not* saying, "it is now an open question whether the right of privacy in-

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7. For example, the Court has not yet passed on the question whether the right of privacy invalidates state statutes prohibiting fornication. *See, e.g.*, O.C.G.A. § 16-6-18 (1984) (Georgia fornication statute).

8. *See Carey v. Population Services Int'l*, 431 U.S. at 718 n. 2, 97 S.Ct. at 2033 n. 2 (Rehnquist, J., dissenting) ("While we have not ruled on *every* conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting *certain* consensual acts has been 'definitively' established." (emphasis added)). Contrary to the majority's view, Justice Rehnquist did *not* consider footnotes 5 and 17 in *Carey* to be in conflict with *Doe v. Commonwealth's Attorney*. Rather, he indicated that footnotes 5 and 17 can, and should, be interpreted *consistently* with *Doe v. Commonwealth's Attorney*.

validates all state statutes regulating any kind of private sexual conduct."

The dismissal of the writ of certiorari in *New York v. Uplinger* is an even less compelling reason for refusing to follow *Doe v. Commonwealth's Attorney.* In *Uplinger* the Court faced a constitutional challenge not to the New York sodomy statute, but to a statute that prohibited loitering in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." N.Y. Penal Law § 240.35-3. The New York Court of Appeals struck down the statute. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983). The Supreme Court granted certiorari, — U.S. —, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983), but in a subsequent *per curiam* opinion dismissed the writ of certiorari as improvidently granted, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984).

The majority recognizes that a dismissal of certiorari, like a grant or denial of certiorari, normally has no precedential effect whatsoever.[9] Yet it construes the *per curiam* opinion accompanying the dismissal of certiorari in *Uplinger* as a "signal" from the Supreme Court that *Doe v. Commonwealth's Attorney* is no longer good law. This conclusion is based on the statement in the opinion that the case "provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties."

---

9. All that can be said with certainty about *Uplinger* is that at least four Justices originally voted to hear the case, and that five Justices subsequently voted not to hear it. *See id.* at —, 104 S.Ct. at 2335 (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting from dismissal of writ of certiorari).

Uplinger, — U.S. at —, 104 S.Ct. at 2334. From this single ambiguous statement, the majority infers (1) that the "important constitutional issues" included whether the right of privacy requires invalidation of all state sodomy laws,[10] and (2) that the Supreme Court intended to reverse or reconsider *Doe v. Commonwealth's Attorney*, but decided to wait for another case to do so.[11] These are inferential leaps greater than I am willing or able to make.

Furthermore, even if the majority's inferences are correct, this would not mean that the lower courts are now free to ignore *Doe v. Commonwealth's Attorney*. That the Supreme Court ultimately found *Uplinger* an "inappro-

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10. The plaintiffs in *Uplinger* raised vagueness, overbreadth, First Amendment, equal protection, and due process challenges to the New York statute. *See id.* at —, 104 S.Ct. at 2333. The *per curiam* opinion dismissing the writ of certiorari did not identify which of these constitutional issues the Supreme Court felt were "important." Furthermore, as the majority notes, the Court was not even certain as to just what federal constitutional issues actually had been decided by the state court. Therefore, unlike the majority, I cannot conclude that the "important constitutional issues" referred to by the Court included the right of privacy and its effect on state sodomy laws.

11. As the majority acknowledges, if *Doe v. Commonwealth's Attorney* indeed was a decision on the merits, then we are bound by that decision until the Supreme Court indicates a "willingness to reverse or reconsider" the case. I find highly questionable any inference that the Supreme Court originally viewed *Uplinger* as an appropriate vehicle for reversing or reconsidering *Doe v. Commonwealth's Attorney*. Three of the four Justices who dissented from the dismissal of the writ in *Uplinger* (and who presumably were among those originally voting to hear the case) were in the majority in *Doe v. Commonwealth's Attorney*, and two of the four dissented in *Carey v. Population Services Int'l. See Uplinger*, — U.S. at —, 104 S.Ct. at 2335 (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting from dismissal of writ of certiorari).

priate vehicle for resolving" whatever constitutional issues the case presented does *not* imply that those issues previously were unresolved. Nor may *this* court reconsider the wisdom of *Doe v. Commonwealth's Attorney* simply because the Supreme Court may have indicated a possible willingness to do so. As the Supreme Court recently noted, "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983); *see also Jaffree v. Wallace*, 705 F.2d 1526, 1532-33 (11th Cir. 1983), *appeal filed on other grounds*, 52 U.S.L.W. 3441 (U.S. Nov. 14, 1983) (No. 83-812), 52 U.S.L.W. 3473 (U.S. Dec. 3, 1983) (No. 83-929), *probable jurisdiction noted*, — U.S. —, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).[12]

III.

Whatever our personal views about the constitutionality of a law that permits the state to regulate the most private of human behavior within the confines of the home, unless and until the Supreme Court clearly indicates otherwise, we are bound by that Court's decision in *Doe v. Commonwealth's Attorney*. Respectfully, therefore, I dissent.

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12. Nor can the majority rely on the Supreme Court's recent affirmance by an equally divided vote in *Board of Educ. v. National Gay Task Force*, — U.S. —, 105 S.Ct. 1858, 84 L.Ed.2d 776 (1985). Affirmances by an equally divided vote are entitled to no precedential weight. *Neil v. Biggers*, 409 U.S. 188, 191-92, 93 S.Ct. 375, 378-79, 34 L.Ed.2d 401 (1972); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264, 80 S.Ct. 1463, 1464, 4 L.Ed.2d 1708 (1960). Furthermore, the Tenth Circuit had held that the right of privacy was *not* implicated by the Oklahoma statute involved in the case. *See National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir.1984).

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8378

D.C. Docket No. 83-273

MICHAEL HARDWICK, ET AL.,

Plaintiffs-Appellants,

versus

MICHAEL BOWERS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

KRAVITCH, Circuit Judge, concurred in part and dissented in part and filed an opinion.

Entered: May 21, 1985

For the Court: Spencer D. Mercer, Clerk

/s/ By: Warren A. Godfrey,
Deputy Clerk

ISSUED AS MANDATE:

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8378

MICHAEL HARDWICK, et al.,

Plaintiffs-Appellants,

versus

MICHAEL BOWERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed June 13, 1985)
(Opinion May 21, 11 Cir., 1985, — F.2d—).
(June 13, 1985)

Before KRAVITCH and JOHNSON, Circuit Judges and TUTTLE, Senior Circuit Judge

PER CURIAM:

(×) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

REHG-6
(Rev. 6/82)

Supreme Court, U.S.
FILED
SEP 12 1985
JR.

(2)

No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

On August 3, 1982, Respondent Michael Hardwick, a 29-year-old gay man, was arrested and charged by the Atlanta Police Department with committing sodomy with another consenting adult in the bedroom of his home. The offense of sodomy, punishable by one to twenty years in prison, criminalizes "any sexual act involving the sex organs of one person and the mouth or anus of another." Official Code of Georgia Annotated (O.C.G.A.) § 16-6-2 (1984). The statute applies to all persons, whether single or married, heterosexual or homosexual.

Hardwick's case was heard by the Atlanta Municipal Court, and bound over to the Superior Court of Fulton County. However, the District Attorney's office has not presented the case to the grand jury, and has formally stated that, unless further evidence develops, the case will not be presented. Hence, there is no prosecution pending; but neither is there any criminal state court forum in which Hardwick can raise his constitutional claims. And, as Hardwick regularly engages in private homosexual acts, and will do so in the future, he, like all other homosexuals in Georgia, is in imminent danger of arrest, prosecution, and potential imprisonment.

On February 14, 1983, Hardwick, together with John and Mary Doe, a married couple who feared prosecution under the same statute, filed their complaint in Federal Court, seeking a declaratory judgment that O.C.G.A. § 16-6-2 (1984), as applied to private sexual conduct between consenting adults, is unconstitutional.

———o———

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly concluded that this Court's summary affirmance in *Doe v. Commonwealth's Attorney* was not binding precedent which required the dismissal of Hardwick's constitutional claims. That conclusion was based on well-established rules as to the limited precedential value of summary affirmances. Petitioner's contention that a summary affirmance without opinion was intended to resolve the complex constitutional question of privacy protection for homosexuals is rebutted by decisions of this Court issued subsequent to *Doe,* and by substantial authority from both state and federal courts that have considered the issue.

In its present procedural posture, the Hardwick case neither presents a ripe conflict with any other circuit nor frames an issue sufficiently concrete to merit this Court's attention. The Eleventh Circuit did not hold the challenged statute unconstitutional, but merely stated the appropriate constitutional standard in the abstract and remanded the case for trial. The instant case thus does not yet present a ripe conflict with the recent Fifth Circuit decision in *Baker v. Wade,* nor does it conflict with the D.C. Circuit decision in *Dronenburg v. Zech,* a military case not involving a challenge to the military sodomy law.

The Eleventh Circuit correctly found that the Georgia sodomy statute, to the extent that it sought to criminalize private sexual conduct between consenting homosexual adults, infringes upon the fundamental constitutional right to personal autonomy and privacy. The statute implicates important associational interests which cannot be impeded without a compelling state interest. In reaching its conclusion, the Eleventh Circuit properly applied precedent

regarding the right of privacy in intimate personal relationships to the specific factual situation presented by Hardwick.

The Eleventh Circuit decision in this case involves no unwarranted extensions of existing law, and in no way jeopardizes Georgia's ability to legislate in legitimate spheres of state regulation. The narrow constitutional right at issue here protects only private, consensual, sexual conduct between adults.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT DOE V. COMMONWEALTH'S ATTORNEY DOES NOT CONSTITUTE BINDING PRECEDENT.

After careful review, the Eleventh Circuit concluded that this Court's summary affirmance of *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g mem*, 403 F. Supp. 1199 (E.D.Va. 1975), *reh'g denied*, 425 U.S. 985 (1976) was not binding precedent which required the dismissal of Hardwick's constitutional claims. In doing so, the Court applied well-established rules on the limited precedential value of such affirmances. That it reached the proper conclusion is supported by this Court's earlier decisions in *Carey v. Population Services*, 431 U.S. 678 (1977) and *New York v. Uplinger*, 58 N.Y.2d 936 (1983), *writ dismissed as improvidently granted*, — U.S. —, 104 S. Ct. 2332 (1984).

Defendants below had contended, and the District Court had agreed, that the summary affirmance in *Doe* precluded consideration of Plaintiff Hardwick's constitutional claims. The threshold issue on appeal thus became the meaning of *Doe*. While clearly acknowledging that a summary affirmance by the Supreme Court has binding precedential effect, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), the Eleventh Circuit undertook the difficult task of identifying the precise limits of the summary affirmance in *Doe v. Commonwealth's Attorney*. The panel diligently applied the principles established in *Mandel v. Bradley*, 432 U.S. 173 (1977), *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 181-83 (1979) and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981), carefully examining both the jurisdictional statement and the facts in *Doe*. It concluded that the "most narrow plausible rationale for [this Court's] summary decision" in *Doe* was plaintiffs' lack of standing.[1] Accordingly, the Court held that the summary affirmance of *Doe* was not based upon, nor did it foreclose consideration of, the constitutional issues raised by Hardwick in the instant case.

Petitioner's contention that a summary affirmance without opinion was intended to resolve the complex con-

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[1] This Court, in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), employed the same reasoning in its discussion of the precedential effects of its summary affirmance in *Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1981). Plaintiffs in *City of Akron* challenged a statute identical to the one upheld in *Gary-Northwest*. In reversing the Sixth Circuit, this Court noted that an alternative ground for its summary affirmance in *Gary-Northwest* was plaintiffs' failure to prove that they were actually burdened by the challenged regulation, and that, accordingly, the decision did not constitute binding precedent on the merits.

stitutional question of privacy protection for homosexuals is rebutted by this Court's decisions in *Carey* and *Uplinger*, issued subsequent to *Doe*. Those cases demonstrate that the Eleventh Circuit analysis of the meaning of *Doe* was not based on mere "speculation" or "unwarranted assumptions", as the Petitioner contends, Petition for *Certiorari, Bowers v. Hardwick*, No. 85-140, at 5, and that the Eleventh Circuit properly performed its difficult task in defining the limits of *Doe*.

Footnotes 5 and 7 in *Carey* and the opinion dismissing *certiorari* in *Uplinger* clearly established that *Doe* is not binding precedent on the specific issues raised by Hardwick, and that sexual privacy between homosexuals is among the "important constitutional issues", *New York v. Uplinger*, 104 S.Ct. at 2334, which the Court has yet to definitively address. Indeed, as the panel correctly noted, those decisions constitute "doctrinal developments" sufficient in and of themselves to relieve lower Courts from any obligation to adhere to the reasoning of the three judge district court's decision in *Doe*. *Hardwick v. Bowers*, 760 F.2d 1202, 1209-1210 (11th Cir. 1985).

Other state and federal courts, when presented with this question, have taken the same view as the Eleventh Circuit on the meaning of *Doe v. Commonwealth's Attorney*. In a decision in which this Court denied *certiorari*, the New York Court of Appeals held that *Doe* was not an obstacle to declaring that homosexuals are covered under the constitutional right to privacy. *People v. Onofre*, 51 N.Y. 2d 476 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981). *See also State v. Saunders*, 75 N.J. 200, 381 A.2d 333, 341 (N.J. 1977); *Neville v. State*, 430 A.2d 570, 574 (Md. 1981). Similarly, the Tenth Circuit recently con-

cluded that "whether some private consensual homosexual activity is constitutionally protected appears to be an unsettled question." *Rich v. Secretary of the Army,* 735 F.2d 1220, 1228 n.8 (10th Cir. 1984). *See also Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980). The Eastern District of Wisconsin also has noted that "the law remains unsettled" on whether private homosexual acts are protected by the right of privacy. *benShalom v. Secretary of Army,* 489 F.Supp. 964, 976 (E.D.Wis. 1980).

Thus, the conclusion reached by the Eleventh Circuit, that *Doe v. Commonwealth's Attorney* does not constitute binding precedent on the question of Hardwick's right to privacy, was eminently correct, and need not be examined by this Court.

II. THE ELEVENTH CIRCUIT HOLDING, WHICH LEAVES THE GEORGIA STATUTE IN PLACE PENDING DETERMINATION OF WHETHER IT IS JUSTIFIED BY A COMPELLING STATE INTEREST, NEITHER PRESENTS A RIPE CONFLICT WITH ANY OTHER CIRCUIT NOR FRAMES AN ISSUE SUFFICIENTLY CONCRETE TO MERIT THIS COURT'S ATTENTION.

In its present procedural posture, the *Hardwick* case neither presents a ripe conflict with any other circuit nor frames an issue sufficiently concrete to merit this Court's attention. After thorough analysis and discussion, the Eleventh Circuit properly concluded that *Doe v. Commonwealth's Attorney* was not binding on the merits, and that it was free to examine the substantial constitutional issues raised by *Hardwick.* The court did not hold the statute unconstitutional. It merely stated the appropriate constitutional test in the abstract, and remanded the case for trial.

The Eleventh Circuit held that in order to prevail at trial, Georgia must prove "a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest." *Hardwick v. Bowers,* 760 F.2d at 1213. Accordingly, review by this Court would be premature.

Petitioner's contention that the Eleventh Circuit decision creates a "conflict in the circuits", Petition for *Certiorari* at 8, with *Dronenburg v. Zech,* 741 F.2d 388, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984), is incorrect. *Dronenburg* was a military case, and the panel discussion of the precedential value of *Doe* was *dicta.*[2] Furthermore, the military regulation criminalizing private consensual sodomy was not even directly challenged in the case.

Nor is there yet a ripe conflict between the instant case and the recent Fifth Circuit decision in *Baker v. Wade,* — F.2d — (*en banc*), No. 82-1590 (5th Cir. Aug. 26, 1985). *Baker,* like the present case, involved a declaratory judg-

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[2] At issue in *Dronenburg* was the constitutionality of a naval discharge regulation, and not the military sodomy law. As noted by Judge Bork himself, author of the panel decision, the standard by which military regulations must be judged is much lower than in a civilian context:

> That the military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court.

741 F.2d at 1392.

Even on the precise issue of the meaning of Doe, other judges from the D.C. Circuit clearly disagreed with the panel view. Chief Judge Robinson, joined by Judges Wald, Mikva, and Edwards, determined, "we do not think that *Doe v. Commonwealth's Attorney* . . . is controlling precedent." *Dronenburg v. Zech,* 746 F.2d at 1580. (citations omitted).

ment challenge to the constitutionality of a state sodomy law. Unlike *Hardwick,* however, a full trial on the merits was held in *Baker,* after which a federal district court found the Texas sodomy law to be unconstitutional. *Baker v. Wade,* 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed,* 743 F.2d 236 (5th Cir. 1984). In *Hardwick,* the Eleventh Circuit has not struck down the challenged statute, but has instead remanded the case for trial with instructions as to the appropriate constitutional standards to apply. Therefore, the issues presented by *Hardwick* are not yet framed concretely, and there is no ripe conflict with *Baker.*[3]

III. THE FUNDAMENTAL CONSTITUTIONAL RIGHTS AT ISSUE IN HARDWICK V. BOWERS ARE WELL-ROOTED IN PRIOR CONSTITUTIONAL PRECEDENTS ON THE RIGHT OF PRIVACY AND DO NOT REQUIRE THIS COURT'S REVIEW.

The Eleventh Circuit found that Georgia sodomy statute, insofar as it sought to criminalize private sexual conduct between consenting homosexual adults, infringed upon Hardwick's fundamental constitutional right to personal autonomy and privacy. The statute, it held, implicated important intimate associational interests,[4] which could not be impeded without a compelling state interest.

---

[3] The state virtually concedes that this case is in a premature posture for Supreme Court consideration because it brings the case before this Court on *certiorari.* Had the statute in fact been held unconstitutional, and thereby presented a ripe issue for review, an appeal pursuant to 28 U.S.C. § 1254(2) would be appropriate and the issues in the case would properly be before this Court.

[4] The First Amendment right of association aspect of this case was not presented in *Doe v. Commonwealth's Attorney,* and hence could not be deemed foreclosed even were the Eleventh Circuit's conclusion on the precedential value of *Doe* in error.

In reaching that conclusion, the Eleventh Circuit properly applied precedent regarding the right of privacy in intimate personal relationships to the factual situation presented by Hardwick. Its holding that the associational interests at issue fall within the protection of the Due Process clause of the Fourteenth Amendment construed in light of the Ninth Amendment was grounded firmly in this Court's recent decisions on privacy, including *Griswold v. Connecticut,* 381 U.S. 479 (1965), *Carey v. Population Services,* 431 U.S. 678, *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and *Zablocki v. Redhail,* 434 U.S. 374 (1978). The opinion does not represent a departure from existing constitutional principles, as Petitioner contends, Petition for *Certiorari* at 8-12, but is, rather, the logical result of their application.

The full scope of the privacy right is as yet undefined. Its "outer limits" have not been established. *Carey v. Population Services, Inc.,* 431 U.S. at 684. However, this Court's decisions in *Carey* and *Eisenstadt* make it clear that the right of sexual privacy is the right of the individual to be free from unwarranted government intrusion into matters fundamentally affecting intimate personal decisions. Given the fact, as the Eleventh Circuit found in *Hardwick,* that "for some the sexual activity in question here serves the same purpose as the intimacy of marriage," 760 F.2d at 1212, there is no basis for excluding acts of sodomy carried out between consenting adults in private from the scope of constitutional protection.

Indeed, given the underlying purposes of the "associational" aspect of the privacy right, as explained by this Court in *Roberts v. United States Jaycees,* — U.S. —,

104 S. Ct. 3244 (1984), the conduct sought to be protected in *Hardwick* falls squarely within the ambit of the First Amendment:

> . . . choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. . .
>
> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. See, e.g. *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Services Int'l,* 431 U.S. 678, 684-6 (1977); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois,* 405 U.S. 645, 651-2 (1972); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

104 S. Ct. at 3249-50.

Moreover, the privacy rights previously recognized by this Court are not limited to marriage and family. As this Court stated in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 65 (1973):

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325 (1937); *Roe v. Wade,* 410 U.S. 113, 152 (1973). *This privacy right encompasses and protects the personal intimacies of*

> *the home,* the family, marriage, motherhood, procreation, and child rearing . . . [citing] *Stanley v. Georgia* . . . (emphasis supplied).[5]

It is significant that Hardwick was arrested for conduct which occurred in the privacy of his own bedroom. That arrest therefore implicated the heightened protections which come into play when a state attempts to regulate consensual intimate activities in the home, a "castle" historically protected from state interference. In light of this Court's decisions in *Payton v. New York,* 445 U.S. 573, 589-90 (1980), and *Stanley v. Georgia,* 394 U.S. 557 (1969), the Eleventh Circuit was compelled to conclude that the privacy interests articulated by Hardwick were of constitutional dimension. Whatever the State's power to regulate certain activities in public, the acts which underlie this case occurred in the home, and require a compelling governmental interest to justify intrusion upon them by the State.

Georgia's contention that the *Hardwick* decision, unless reviewed and reversed by this Court, will somehow wreak havoc in the courts and streets of Georgia and its

---

[5] This Court went on, at footnote 13, to affirm the separate status of the privacy right in "personal intimacies of the home":

> The protection afforded by *Stanley v. Georgia,* 394 U.S. 557 (1969), is restricted to a place, the home. In contrast, the constitutionality protected privacy of family, marriage, motherhood, procreation and child rearing is not just concerned with a particular place, but with a protected intimate relationship.

413 U.S. at 66, n.13.

sister states is simply unfounded.[6] *Hardwick* involves no unwarranted extensions of existing law, and does not present the issue of Georgia's capacity to legislate in such spheres of regulation as suicide, drug abuse, prostitution or bigamy. As this Court noted in *Paris Adult Theatre I v. Slaton*, it is not for the courts "to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." 413 U.S. at 60. The "rights protected by the Constitution" in this case are narrow. The only activity which the Eleventh Circuit has said is not a proper area for state regulation, absent a compelling state interest, is private, consensual sexual activity between adults.

The decision of the Eleventh Circuit was thus well-grounded in established constitutional principles, and contrary to Petitioner's assertion, does not involve the creation of any new rights. Accordingly, there is no basis for this Court's review.

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[6] The vast majority of the American population lives in reformed jurisdictions where consensual sodomy is not criminalized, and there is no indication that these states have been paralyzed in their ability to deal with legitimate areas of state regulation. The legislatures in twenty-two states have decriminalized private consensual homosexual acts: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming. In two other states, sodomy laws have been judicially declared unconstitutional: New York, *People v. Onofre*, 51 N.Y.2d 476; Pennsylvania, *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

———o———

CONCLUSION

The decision of the Eleventh Circuit as to both the meaning of this Court's summary affirmance in *Doe v. Commonwealth's Attorney* and the constitutional standard by which Georgia's sodomy statute must be reviewed is eminently correct, and requires no review by this Court.

Accordingly, the petition for *certiorari* should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Petitioner hereby adopts and incorporates herein by reference the statement of the case contained in the petition for a writ of certiorari, and will not restate the statement of the case herein.

SUMMARY OF ARGUMENT

Contrary to Respondents' assertion, the recent decision of the Fifth Circuit Court of Appeals in *Baker v. Wade,* 769 F.2d 289 (5th Cir. 1985) (en banc) does present a ripe conflict with the Eleventh Circuit's decision in the case sub judice. The en banc decision in *Baker,* which upheld the constitutionality of Texas' sodomy statute, was founded squarely upon this Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond,* 425 U.S. 901 (1976), aff'g 403 F.Supp. 1199 (E.D. Va. 1975, reh'g denied, 425 U.S. 985 (1976). The *Baker* decision held that *Doe's* summary affirmance is binding precedent, and that it should be followed until this Court determines otherwise. This presents a clear conflict with the decision below. *See also Dronenburg v. Zech,* 741 F. 2d 388, reh'g denied 746 F.2d 1579 (D.C.Cir. 1984).

In addition, homosexual sodomy, like polygamy, is not protected by any "associational interest" embodied in a constitutional right of privacy. See *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985).

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN BAKER V. WADE BY ERRONEOUSLY CONCLUDING THAT DOE V. COMMONWEALTH'S ATTORNEY DOES NOT CONSTITUTE BINDING PRECEDENT.

In the petition for certiorari, Attorney General Bowers demonstrated that the decision below was contrary to *Dronenburg v. Zech,* 741 F.2d 1388, 1392, reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984). Since the filing of the petition for certiorari, the Fifth Circuit Court of Appeals, in an en banc decision, upheld the constitutionality of Texas' sodomy statute. *Baker v. Wade,* 769 F.2d 289 (5th Cir. 1985) (en banc). The decision in that case was specifically founded upon the continuing efficacy of *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976). The *Baker* court stated as follows:

> We consider the decision of the Court in *Doe* to be binding upon us for the reasons stated by the District of Columbia circuit in *Dronenburg v. Zech,* 741 F.2d 1388, 1391-92 (D.C.Cir. 1984), and by Judge Kravitch in her dissent to the Eleventh Circuit opinion in *Hardwick v. Bowers,* 760 F.2d 1202, 1213-16 (11th Cir. 1985). There can be no question but that the decision of the Supreme Court in *Doe* was on the merits of the case, not on the standing of the plaintiffs to bring the suit. We should follow that controlling authority until the Supreme Court itself has issued an unequivocal statement that *Doe* no longer controls.

Id., at 292.

Respondents claim that the issues presented by the *Hardwick* opinion are not yet framed concretely, and that there is no ripe conflict between *Hardwick* and *Baker*. To the contrary, Petitioner shows that the issues are certainly framed with exacting clarity: Is *Doe* binding precedent? Is there a fundamental right of privacy protecting homosexual conduct? If there is such a fundamental right, must Georgia's sodomy statute withstand the strict scrutiny required in the demonstration of a "compelling state interest?"

The decision below found that *Doe* is not binding and that there is a fundamental right to engage in homosexual sodomy. The Eleventh Circuit has mandated that the statute be tested under the compelling state interest criteria. On the other hand, both *Baker* and *Dronenburg* conclude that *Doe* is binding precedent. Both *Baker* and *Dronenburg* conclude that there is no right of privacy to engage in consensual sodomy. Both *Baker* and *Dronenburg* conclude that the standard of review is whether the statute is rationally related to a legtimate state purpose.

In *Baker*, albeit in the context of equal protection, the Fifth Circuit stated:

> In view of the strong objection to homosexual conduct, which has prevailed in western culture for the past seven centuries, we cannot say that '§ 21.06 is 'totally unrelated to the pursuit of' *Id.*, at 809, 89 S.Ct. at 1408, 22 L.Ed.2d at 745, implementing morality, a permissible goal, *Burman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C.Cir. 1984).

Id., at 292.

It is thus urged that there is a remarkable conflict between the Eleventh Circuit and the Fifth and District

of Columbia Circuits. It is also urged that this conflict is ripe for reconciliation by this Court.

II. THE ASSOCIATIONAL ASPECTS OF THE RIGHT OF PRIVACY DO NOT EXTEND TO HOMOSEXUAL ACTS OF SODOMY.

The opinion below held that while homosexual sodomy is not procreative, "it does involve important associational interests." *Hardwick v. Bowers,* 760 F.2d 1202, 1211 (11th Cir. 1985). The Court then proceeded to equate sodomy with the intimacy of marriage. Respondents urge that the Eleventh Circuit's conclusion that sodomy serves the same purpose, for at least some homosexuals, as marital intimacy, demands the conclusion that sodomy is an activity protected as a fundamental right of privacy, because of its "associational" aspects.

However, Petitioner maintains that if this were the law, then statutes prohibiting polygamy must also fall. The polygamous marriage, it can certainly be argued, serves the same purpose for some as the monogomous marriage. Associational aspects are certainly present. Yet, in *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985), the Court of Appeals for the Tenth Circuit found no authority for extending the right of privacy to polygamous marriages. *Cf. Paris Adult Theater I v. Slaton,* 413 U.S. 49, 68 at n.15 (1973). Likewise, it is asserted that the decision below is unsupported by authority and represents an extension of constitutional protections well beyond what has been recognized by this Court.

———o———

CONCLUSION

For the foregoing reasons, and those set forth in the original petition for a writ of certiorari, it is urged that the writ should be issued to review the judgment and opinion below.

Respectfully submitted,

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No. 85-140

In The
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October Term, 1985

MICHAEL J. BOWERS,
Attorney General of Georgia,

Petitioner,

v.

MICHAEL HARDWICK AND
JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed July 25, 1985
Certiorari Granted November 4, 1985

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RELEVANT DOCKET ENTRIES

Complaint	February 14, 1983
Motion of Defendant Lewis Slaton to Dismiss With Memorandum	March 7, 1983
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Petition for Certiorari Filed	July 25, 1985
Certiorari Granted	November 4, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

FILE NO. C83-0273A

MICHAEL HARDWICK, JOHN DOE and MARY DOE,

Plaintiffs,

vs.

MICHAEL BOWERS, Attorney General of the State of Georgia, LEWIS SLATON, District Attorney for Fulton County, and GEORGE NAPPER, Public Safety Commissioner of the City of Atlanta,

Defendants.

COMPLAINT

(Filed February 14, 1983)

1.

This is an action for a declaratory judgment that Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) is unconstitutional, insofar as it makes consensual sodomy a crime, in violation of the Plaintiffs' constitutional right of privacy.

2.

Jurisdiction

Plaintiffs invoke this Court's jurisdiction under the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution, 28 U.S.C. 1331, 1343 (3) and (4), 42 U.S.C. 1983 and 1988, and 28 U.S.C. 2201 and 2202.

3.

Venue

Venue is proper in this district under 28 U.S.C. 1391 (B) since it is the district in which the claim arose.

4.

Parties

Plaintiff MICHAEL HARDWICK is a citizen of the United States, residing in the City of Atlanta, Fulton County, Georgia. He is 29 years of age. HARDWICK is a practicing homosexual, who regularly engages in private homosexual acts and will do so in the future.

5.

Plaintiffs JOHN and MARY DOE are a lawfully married couple who seek to engage in sexual activity now proscribed by Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) in the privacy of their home.

6.

Defendant MICHAEL BOWERS is sued in his official capacity as the Attorney General of the State of Georgia, charged with the State-wide enforcement and administration of the challenged statute.

7.

Defendant LEWIS SLATON is the District Attorney for Fulton County, Georgia, and is charged with the enforcement and administration of the challenged statute in Fulton County.

8.

Defendant GEORGE NAPPER is the Public Safety Commissioner of the City of Atlanta, and is sued in his official capacity. It is his duty to formulate rules and regulations for the operation of the bureau of police services, and to enforce applicable laws and ordinances, including the challenged statute.

Facts

9.

On or about August 3, 1982, Plaintiff MICHAEL HARDWICK was arrested by a member of the Atlanta City Police Department and charged with committing the crime of sodomy, a violation of Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002), in the bedroom of his own home.

10.

On September 14, 1982, Plaintiff HARDWICK appeared in the Municipal Court of the City of Atlanta to answer the charge, and the case was transferred to the Superior Court of Fulton County.

11.

The case has not been presented to the grand jury, and the District Attorney's Office has stated that it will not be presented unless further evidence develops (see letter attached as Exhibit A). There is now no pending criminal prosecution in Georgia against Plaintiff HARDWICK.

12.

Plaintiffs JOHN and MARY DOE have been chilled and deterred from engaging in personal, private sexual activity by the existence of the Georgia sodomy statute and the recent arrest of Plaintiff HARDWICK.

13.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) provides in pertinent part:

> "A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . A person convicted of sodomy shall be punished by imprisonment for not less than one nor more than 20 years."

14.

The Georgia statute makes it a crime for all persons—including married people, unmarried people, and homosexuals—to engage in private, consensual sodomy.

15.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002), as administered and enforced by defendants, places Plaintiff HARDWICK and all other practicing homosexuals in imminent danger of arrest, prosecution and imprisonment.

16.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) imposes a burden upon and significantly interferes with the decisions of Plaintiffs JOHN and MARY DOE in their personal, private sex life.

17.

Plaintiffs have no adequate remedy at law.

Cause of Action

18.

Sexual conduct in private between consenting adults is protected by a fundamental right of privacy, guaranteed by the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution.

19.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) is unconstitutional in that:

(a) It violates the Due Process Clause of the Fourteenth Amendment, in that there is no compelling state interest which would justify the statute's interference with Plaintiffs' fundamental right of privacy;

(b) In the alternative, it violates the Due Process Clause of the Fourteenth Amendment in that there is no rational relationship between any legitimate state purpose and the statute at issue;

(c) The statute is unconstitutionally overbroad in that it does not distinguish between public and private activities. The statute purports to reach private consensual conduct as well as unprotected public acts;

(d) The statute violates the guarantees of the First Amendment, by depriving Plaintiffs' of their freedom of expression and association, rights protected by the Fourteenth Amendment.

WHEREFORE, Plaintiffs pray:

(a) That Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) be declared unconstitutional;

(b) Plaintiffs be awarded their costs and attorney's fees under 42 U.S.C. 1988;

(c) All such other and further relief as this Honorable Court deems just and proper.

HAZLETON & SWEET, P.C.
/s/ Kathleen L. Wilde
/s/ John F. Sweet

950 South Omni Int'l
Atlanta, GA 30303
(404) 688-6700

/s/ Louis Levenson
ATTORNEYS FOR PLAINTIFFS

990 Edgewood Avenue, N.E.
Atlanta, GA 30307
(404) 577-7103

EXHIBIT A

LEWIS R. SLATON

District Attorney—Atlanta Judicial Circuit
Third Floor Courthouse • Atlanta, Georgia 30303

January 7, 1983

Mr. Louis Levenson
Attorney At Law
990 Edgewood Avenue N.E.
Atlanta, Georgia 30307

RE: Michael Hardwick

Dear Louis,

This is to confirm our position on the above-styled case. Michael Hardwick and his co-defendant cases were not presented to the Grand Jury on October 7, 1982. Unless further evidence develops, the cases will remain as not presented to the Grand Jury.

Sincerely,

/s/ Kenneth L. Marshall
Assistant District Attorney
Atlanta Judicial Circuit

KLM:jnb

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

FILE NO. C83-273A

MICHAEL HARDWICK, et. al.,

Plaintiffs

vs.

MICHAEL BOWERS, Attorney General of Georgia;

LEWIS SLATON, District Attorney, et. al.,

Defendants

MOTION TO DISMISS OF DEFENDANT LEWIS SLATON

(March 7, 1983)

Now comes LEWIS SLATON, District Attorney for the Atlanta Judicial Circuit of Georgia, and defendant herein, and files this Motion to Dismiss, and respectfully shows the Court as follows:

1.

The above-styled case should be dismissed in its entirety because it fails to state a claim upon which relief may be granted. *Fed. R. Civ. P.* 12(b)(6).

2.

The above-styled case should be dismissed as to defendant LEWIS SLATON because it fails to state a justiciable controversy, or is one which is ripe for decision.

3.

This Court should abstain from deciding this case, because it presents an issue of State criminal law which has not been presented to or decided by the Supreme Court of Georgia.

4.

This Court should not award Attorneys fees as against Defendant Slaton who is sued in his official capacity only, and who, in his official capacity, is absolutely immune.

WHEREFORE, the defendant LEWIS SLATON respectfully prays that this action be dismissed, and the costs thereof taxed against the plaintiffs.

Respectfully,

LEWIS R. SLATON
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
By /s/ H. Allen Moye
Assistant District Attorney
Atlanta Judicial Circuit

Third Floor Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30335
(404) 572-2539

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

FILE NO. C83-272A

MICHAEL HARDWICK,
et. al.,

Plaintiffs

vs.

MICHAEL BOWERS, Attorney
General of Georgia;
LEWIS R. SLATON, District
Attorney, et. al.,

Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the within and foregoing pleadings upon the following attorneys of record for plaintiffs and parties at interest by mailing copies of same, postage prepaid, to:

Kathleen L. Wilde
John F. Sweet
Attorneys at Law
950 South Omni International
Atlanta, Georgia 30303

Louis Levenson
Attorney at Law
990 Edgewood Avenue, N.E.
Atlanta, Georgia 30307

Honorable Michael Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Ms. Marva Jones Brooks
City Attorney
City of Atlanta, Department of Law
2000 Bank of the South Building
Atlanta, Georgia 30303

This 7th day of March, 1983.

/s/ H. Allen Moye
Attorney for Lewis Slaton

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-0273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

v.

MICHAEL BOWERS, etc., et al.,

DEFENDANT MICHAEL BOWERS' MOTION TO DISMISS

(Filed April 1, 1983)

Comes now Michael J. Bowers, Attorney General for the State of Georgia, and, pursuant to Fed. R. Civ. P. 12(b)(6), moves the court to dismiss the complaint in the above-styled case on the grounds that it fails to state a claim for which relief can be granted. This motion is based upon the brief which is filed herewith.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

/s/ MARION O. GORDON
First Assistant Attorney General

/s/ JOHN C. WALDEN
Senior Assistant Attorney General

/s/ GEORGE M. WEAVER
Assistant Attorney General

Please serve:

GEORGE M. WEAVER
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-2976

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Defendant Michael Bowers' Motion to Dismiss and Brief in Support of Defendant Michael Bowers' Motion to Dismiss, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Kathleen L. Wilde, Esq.
John F. Sweet, Esq.
950 South Omni International
Atlanta, Georgia 30303

Louis Levenson
990 Edgewood Avenue, N.E.
Atlanta, Georgia 30307

H. Allen Moye, Esq.
Assistant District Attorney
Third Floor Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30305

Marva Brooks, Esq.
City of Atlanta
Department of Law
2000 Bank of the South Building
Atlanta, Georgia 30303

This 1st day of April, 1983.

/s/ GEORGE M. WEAVER
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-0273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

v.

MICHAEL BOWERS, etc., et al.,

Defendants.

DEFENDANT GEORGE NAPPER'S MOTION TO DISMISS

(Filed April 18, 1983)

Comes now the defendant, George Napper, and moves the court to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Marva Jones Brooks
/s/ Alford J. Dempsey, Jr.
/s/ George R. Ference

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the within and foregoing pleadings upon the following attorneys of record for plaintiffs and parties at interest by mailing copies of same, postage prepaid, to:

Kathleen L. Wilde
John F. Sweet
Attorneys at Law
950 South Omni International
Atlanta, Georgia 30303

Louis Levenson
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Atlanta, Georgia 30307

George M. Weaver
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Honorable Michael Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

H. Allen Moye
Assistant District Attorney
Third Floor Courthouse
136 Prior St.
Atlanta, Georgia 30335

This 18th day of April, 1983.

/s/ George R. Ference
Attorney for defendant, George Napper

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

ORDER

(Filed April 18, 1985)

Plaintiffs, a male homosexual and a married couple, seek a declaratory judgment that Official Code of Georgia Annotated § 16-6-2 is unconstitutional, insofar as it makes consensual sodomy a crime. Plaintiffs allege that the statute violates their constitutional rights of privacy, due process, and freedom of expression and association. Defendants, Michael Bowers, Attorney General of Georgia, and Lewis Slaton, District Attorney of Fulton County, have filed motions to dismiss for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Additionally, it is argued that there is no justiciable controversy as to the married couple, the Does.

The statute in question provides in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .

As to plaintiffs Doe, the court must agree that their allegations do not create a justiciable controversy. The Does allege that they are a married couple who seek to engage in sexual activity proscribed by O.C.G.A. § 16-6-2 in the privacy of their home. Additionally, they allege that they have been chilled and deterred from engaging in the activity by the existence of the statute and the recent arrest of plaintiff Hardwick for sodomy under the statute. Hardwick's case, however, has not been presented to the grand jury, and the District Attorney's Office has stated that it will not be presented unless further evidence develops.

The Does do not allege that they have been threatened with prosecution or that any other married couple has been prosecuted or threatened with prosecution under the statute. Even though plaintiff Hardwick was arrested, he has not been prosecuted. Like the married couple in *Poe v. Ullman,* 367 U.S. 497, 505 (1961), the Does are unable to show that they have sustained or are in immediate danger of sustaining some direct injury as a result of the statute's enforcement. *See also Roe v. Wade,* 410 U.S. 113, 127-29 (1973).

As to plaintiff Hardwick, his arguments are foreclosed by the Supreme Court's affirmance of a three-judge district court decision upholding the constitutionality of the Virginia sodomy statute. *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F. Supp. 1199 (E.D.

Va. 1975), *aff'd*, 425 U.S. 901 (1976). The Virginia statute challenged in that case is quite similar to the Georgia legislation in question here, and all the constitutional arguments made by Hardwick here were rejected in *Doe*.

For these reasons, the motions to dismiss are GRANTED.

So ORDERED this 15 day of April, 1983.

/s/ Robert H. Hall
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

ORDER

(Filed April 22, 1983)

Defendant Napper's motion to dismiss is GRANTED for the same reasons stated in this court's order dated April 15, 1983 granting defendants, Michael Bowers, Attorney General of Georgia, and Lewis Slaton, District Attorney of Fulton County motions to dismiss.

So ORDERED this 22nd day of April, 1983.

/s/ Robert H. Hall
United States District Judge

JUDGMENT ON DECISION BY THE COURT
FOR THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

CIVIL ACTION DOCKET NO. C83-273A

MICHAEL HARDWICK

Plaintiff

vs.

JOHN DOE, MARY DOE, MICHAEL BOWERS,
Attorney General, LEWIS SLATON, et al

Defendants

JUDGMENT

This action came on for hearing before the court, United States District Judge ROBERT H. HALL presiding. The issues having been duly heard and a decision having been duly rendered, granting defendants' motions for summary judgment, IT IS ORDERED AND ADJUDGED that the plaintiff, MICHAEL HARDWICK take nothing, that action be dismissed and that the defendants recover their costs of Action.

Dated at: Atlanta, Georgia
Filed and entered in the Clerk's office: 4/22/82
BEN H. CARTER, CLERK

By: Danny Brown
Deputy Clerk of the Court
Date: April 22, 1983
BEN H. CARTER, CLERK

By: Danny Brown
Deputy Clerk of the Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

NOTICE OF APPEAL

(Filed May 19, 1983)

Notice is hereby given that the Plaintiffs in this action hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the judgment entered April 22, 1983, granting defendants' motions for summary judgment and dismissing the action, and the Court's order of May 17, 1983, denying Plaintiffs' motion for reconsideration.

This 19 day of May, 1983.

Hazleton & Sweet, P.C.
Kathleen L. Wilde
Attorney for Plaintiffs

950 South Omni Int'l
Atlanta, GA 30303
(404) 688-6700

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the within and foregoing pleading upon defendants by mailing copies of the same, postage prepaid, addressed as follows:

George M. Weaver
Assistant Attorney General
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H. Allen Moye
Assistant District Attorney
Third Floor Courthouse—136 Pryor Street
Atlanta, GA 30303

George R. Ference
Suite 1100 South
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Atlanta, GA 30303

This 19 day of May, 1983.

Kathleen L. Wilde
Attorney for Plaintiffs

No. 85-140

(6)

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER MICHAEL J. BOWERS ATTORNEY GENERAL OF GEORGIA

MICHAEL J. BOWERS
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December 19, 1985

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51 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in concluding that *Doe v. Commonwealth's Attorney for the City of Richmond,* 425 U.S. 901 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975), which upheld the constitutionality of Virginia's sodomy statute, does not constitute precedent binding upon lower federal courts.

II. Whether the Court of Appeals erred in concluding that Georgia's sodomy statute infringes upon the fundamental rights of homosexuals and in requiring the State of Georgia to demonstrate a compelling state interest in order to support the constitutionality of the statute.

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No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER MICHAEL J. BOWERS ATTORNEY GENERAL OF GEORGIA

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit which declared that this Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd*, 425 U.S. 90 (1976), and which concluded that Georgia's sodomy statute infringes upon Respondent Hardwick's constitutional right of privacy, appears in the Appendix to the Petition for the Writ of Certiorari [hereinafter Cert. App.] at 5 through 35 (Cert. App. 5-35), and is reported at 760 F.2d 1202 (11th Cir. 1985).

The opinion of the District Court for the Northern District of Georgia, which upheld the constitutionality of

Georgia's sodomy statute, and which appears in the Joint Appendix at 17 through 19, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 21, 1985. A timely suggestion for rehearing en banc was filed on May 30, 1985, and denied on June 13, 1985. The petition for a writ of certiorari was filed on July 25, 1985, and the writ was granted on November 4, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

Official Code of Georgia Annotated, § 16-6-2(a) (1984):

> A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

STATEMENT OF THE CASE

Respondents, Michael Hardwick and John and Mary Doe, filed their complaint in this case on February 14, 1983. Hardwick alleged that he is a practicing homosexual

who regularly engages in private homosexual sodomy, and that he will do so in the future. The Does alleged that they are lawfully married and have had the ambition to engage in activities proscribed by the Georgia sodomy statute, O.C.G.A. § 16-6-2 (1984). The Respondents, in seeking declaratory and injunctive relief, claimed that the statute violated their right of privacy under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, and that it violated their rights to due process of law, was unconstitutionally overbroad, and denied them their freedom of expression and association. (Joint Appendix at p. 6).

Each Defendant, including Petitioner Bowers, filed separate motions to dismiss. The district court, in an order entered by the Honorable Robert H. Hall, dismissed the complaint as to the Does on the basis of their lack of standing. As to Hardwick, the complaint was dismissed on the ground that all of his constitutional claims had been rejected by this court in *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 90 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975). (Joint Appendix at p. 19).

Respondents appealed Judge Hall's decision to the United States Court of Appeals for the Eleventh Circuit and on May 21, 1985, in an opinion authored by the Honorable Frank M. Johnson, Circuit Judge, a majority of the panel found (1) that Hardwick possessed sufficient standing to pursue the action, while the Does lacked standing; (2) that this Court's summary affirmance in *Doe v. Commonwealth's Attorney, supra,* is not binding precedent; and (3) that Georgia's sodomy statute infringes upon Hardwick's fundamental right of privacy and association and consequently the State of Georgia would be required

upon the trial of this case to establish the existence of a compelling state interest in proscribing consensual homosexual sodomy in order to validate the statute. (Cert. App. at 12-26).

The Honorable Phyllis A. Kravitch, Circuit Judge, filed a separate opinion concurring in part with the majority panel decision but dissenting from the majority conclusion that *Doe v. Commonwealth's Attorney* is not binding on lower federal courts. (Cert. App. at 26-35).

On May 30, 1985, a suggestion for rehearing en banc was filed on behalf of Petitioner Bowers and was denied on June 13, 1985.

The Petition for a Writ of Certiorari was filed with this Court by Petitioner Bowers on July 25, 1985, and the writ was granted on November 4, 1985.

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit has failed to follow binding precedent of this Court in the case of *Doe v. Commonwealth's Attorney*. While the Court of Appeals recognized that a summary affirmance by this Court has binding precedential effect, *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975), it erroneously concluded that *Doe* is not binding since this Court could have approved the result reached by the District Court in *Doe* without considering the substantive constitutional issues because the Plaintiffs in *Doe* were perceived by the Court of Appeals as lacking sufficient standing to sue. *Hardwick v. Bowers*, 760 F.2d 1202, 1207 (11th Cir. 1985) (Cert. App. at 14).

In addition, the Court below erroneously concluded that there had been subsequent doctrinal developments which would release lower federal courts from the binding effects of *Doe,* permitting the lower courts to reach their own conclusions as to whether a fundamental right to engage in homosexual sodomy exists under the constitution.

In arriving at these conclusions, the court below made unwarranted assumptions and misconstrued prior precedents of this Court relating to the efficacy of its summary decisions.

Moreover, the court below seriously erred in judicially creating a fundamental right of privacy to engage in homosexual sodomy, and by finding constitutional protection for this perceived right. Furthermore, the court below erroneously concluded that the act of homosexual sodomy proscribed by Georgia statute violates Hardwick's right of intimate association protected by the Ninth Amendment and perceptions of fundamental fairness embodied in the due process clause of the Fourteenth Amendment. These erroneous conclusions are unsupported by any previous decisions of this Court, the textual content of the Constitution itself, or any adherence to the concept that such rights that can be deemed fundamental must be rooted in traditional values and encompass only those rights "implicit in the concept of ordered liberty." *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 65 (1973); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

ARGUMENT

I. The Court Below Erroneously Concluded That Doe v. Commonwealth's Attorney Does Not Constitute Supreme Court Precedent Binding Upon Lower Federal Courts.

In *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975), a three judge district court upheld the constitutionality of Virginia's sodomy statute against claims that the statute violated due process of law, freedom of expression, and the right of privacy as it related to homosexual conduct and concluded in plain and unequivocal language that the right of privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny does not extend to private consensual homosexual sodomy. The district court further found that the State has a legitimate interest in proscribing such conduct, rationally related to the suppression of moral delinquency and crime. On appeal, the district court's decision was summarily affirmed by this Court without opinion. 425 U.S. 901 (1976).

Petitioner Bowers, in the case sub judice, moved the United States District Court for the Northern District of Georgia to dismiss the present action brought by Michael Hardwick and John and Mary Doe, based upon this Court's summary affirmance in *Doe v. Commonwealth's Attorney*. The District Court concluded that *Doe* was binding precedent on the issue and rendered judgment accordingly. (Joint Appendix at 18).

The Court of Appeals for the Eleventh Circuit, however, determined that it was free to draw its own conclusions as to whether a right of privacy exists which would

protect Michael Hardwick and others who practiced consensual sodomy from state interference, and held that *Doe* was not binding since this Court ". . . could have approved the result reached by the District Court without addressing the constitutional issues because the Plaintiffs plainly lacked standing to sue." *Hardwick*, 760 F.2d at 207 (Cert. App. at 14).

The Court of Appeals further found that even if this Court had addressed the merits at issue in *Doe*, subsequent "doctrinal developments" have authorized independent exercise of judgment by the lower courts in this area.

It is urged that the Court below seriously erred in reaching these conclusions in order to evade *Doe v. Commonwealth's Attorney.*

Unquestionably, a summary affirmance by this Court is a decision on the merits and therefore a binding precedent. As Justice Brennen once observed, "votes to affirm summarily are votes on the merits of the case. . . ." *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959), *quoted in Hicks v. Miranda*, 422 U.S. 332, 344 (1975). In *Hicks* this Court went on to say:

> [T]he lower courts are bound by summary decisions by this court 'until such time as the court informs [them] that [they] are not.' [Cit. omitted.]

Id. at 344-45. In a later decision, this Court instructed:

> Summary affirmances and dismissal for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent the lower courts from

> coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

Mandel v. Bradley, 432 U.S. 173, 176 (1977). *See also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n. 20 (1970).

A. Standing Was Not An Issue Presented Or Necessarily Decided in Doe v. Commonwealth's Attorney.

As mentioned in Circuit Judge Kravitch's dissent in the court below, the jurisdictional statement before this Court in *Doe v. Commonwealth's Attorney* mentioned only the substantive constitutional issues involved and decided by the United States District Court for the Eastern District of Virginia.[1] Neither the decision by the district court nor the jurisdictional statement before this Court even alluded to standing as an issue, indicating that the *Doe* plaintiffs had been found to have sufficient standing. Thus, it is urged that the standing issue raised by the Court of Appeals below would have been at the very most a question which "merely lurk[ed] in the record," *Webster v. Fall*, 266 U.S. 507, 511 (1925), and which would not have been resolved by this Court. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979). Thus, the Court of Appeals, as did Professor Tribe in his trea-

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[1]The question presented in Doe's jurisdictional statement was "whether Virginia Code Section 18.1-212, as applied to sexual activity between consenting adults in private, violated appellants' constitutional rights to privacy, to due process of law, and to the equal protection of the laws, under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution." Jurisdictional Statement, *Doe v. Commonwealth's Attorney*, Sup. Ct. Docket # 75-896, October Term 1975.

tise, *American Constitutional Law*, at 943 (1978), erroneously inferred the resolution of an issue which was neither "presented" nor "necessarily decided" by this Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Such an inference drawn by the court below was neither warranted nor permitted. *Illinois State Bd. of Elections*, 440 U.S. at 183.

Judge Kravitch's dissent also observed that if this Court had decided *Doe v. Commonwealth's Attorney* based upon a purported lack of standing of the Plaintiffs, this Court would have dismissed the appeal rather than rendering a summary decision on the merits, "whether the lack of standing was the result of Article III case-or-controversy considerations, or of purely prudential concerns." *Hardwick*, 760 F.2d at 1214 (Kravitch, J., dissenting) (Cert. App. at 30). *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In its constitutional dimension, standing imports justiciability: whether the Plaintiff has made out a 'case or controversy' between himself and the Defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the Court to entertain the suit."); *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (dismissal of appeal because of prudential standing considerations).

The majority opinion in the court below attempted to show that this Court does not always dismiss appeals where there is a lack of standing by citing *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Littleton*, 414 U.S. 488 (1974). In both of these cases, however, this Court *reversed* lower appellate decisions which had erroneously found standing to exist. In such circumstances, the dismissal of an appeal to this Court would have presump-

tively left the erroneous decision in effect absent some direction by this Court requiring the lower court to vacate its judgment. No case was cited by the majority below in which this Court *affirmed* a lower court's dismissal on the *merits*, basing its affirmance upon finding of a lack of standing of the plaintiffs to sue.

While the majority of the court below also cited *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 499 (1981), for the proposition that summary dispositions by this Court extend only to "the precise issues presented and necessarily decided by those actions," the Court specifically noted in that case that the Supreme Court of California had been "quite right in relying on our summary decisions as authority for sustaining the . . . ordinance against First Amendment attack." *Id.* at 500, *citing Hicks v. Miranda, supra.* The Court went on to note that such summary dispositions certainly do not have the same authority in *this Court* as do decisions after plenary consideration. 453 U.S. at 400. This observation indicates clearly, however, that lower courts may not look upon such summary decisions in the same manner as this Court. They are and should be bound by those decisions until the Court informs them that they are not. *Hicks v. Miranda* 422 U.S. at 345-46, *quoting Doe v. Hodgson*, 478 F.2d 537, 539 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1096 (1973). It is suggested that if there is to be stability in the federal judicial system, doubts as to the binding effect of this Court's summary decisions should be resolved in favor of their continuing efficacy. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982). As Circuit Judge Bork indicated in *Dronenberg v. Zech*, 741 F.2d 1388 (D.C.Cir. 1984), it certainly would be unwise for a lower federal court to distinguish a precedent

of the Supreme Court "on the speculation that it might possibly have had something else in mind." *Id.* at 1392. *See also Baker v. Wade,* 769 F.2d 289, *reh'g denied,* 774 F.2d 1287 (5th Cir. 1985) (en banc). It is submitted that the court below has erroneously engaged in such speculation.

B. There Have Been No Subsequent Doctrinal Developments Since Doe.

The majority below found two actions by this Court constituted "doctrinal developments" which relieved it of any burden to follow the summary affirmance in *Doe.* The first "action" appeared in *Carey v. Population Services International,* 431 U.S. 678 (1977), in which it was held, *inter alia,* that states could not prohibit the sale of non-prescription contraceptives to adults by others than licensed pharmacists. The precise "action" referred to by the court below was a reference in two footnotes in that decision that the extent to which the Constitution prohibits state regulation of private consensual sexual behavior has not definitely been answered. *Id.* at 688 n. 5, 694 n. 17.

The second "action" by this Court was its dismissal of certiorari in *New York v. Uplinger,* — U.S. —, 104 S.Ct. 2332 (1984). In that case, the New York Court of Appeals had invalidated a statute prohibiting loitering in public places for the purpose of engaging in or soliciting "deviate sexual behavior." The majority of the court below concluded that this Court's grant of certiorari in *Uplinger* was an indication that this Court was prepared to address the constitutionality of state statutes involving sodomy.

It is urged that the court below has overreached in its efforts to evade *Doe,* and its conclusions with respect to purported doctrinal developments cannot be objectively supported. This is due, in part, to what is perceived by Petitioner as the compounding of an error first committed in *Lecates v. Justice of the Peace Court No. 4,* 637 F.2d 898 (3rd Cir. 1980). In that case, after giving due consideration to this Court's decisions concerning the manner in which summary affirmances are to be regarded by lower courts, the Third Circuit, without supporting authority, stated:

> [I]ndications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition.

Id. at 904.

However, in *Hicks v. Miranda, supra,* this Court had indicated that the doctrinal developments exception was to be applied to summary dismissals for want of a substantial federal question. No mention was made of its possible application to summary affirmances. Thus, it is not clear that the Third Circuit correctly extended the doctrinal development exception to such affirmances, and it is urged that it did not.

But assuming, arguendo, that a doctrinal development would relieve a lower court from following a summary affirmance, such a development must, of necessity, occur in this Court itself. "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines v. Jordan K. Rand, Ltd.,* 460 U.S. 533, 535 (1983); *See also Jaffree v. Wallace,* 705 F.2d 1526, 1532 (11th Cir. 1983), *aff'd,* — U.S. —, 105 S.Ct. 2479 (1985). Moreover, "some

clear indication that the Supreme Court would no longer follow [a] precedent . . ." is required. *Henderson v. Cronvich*, 402 F.2d 763, 764 (5th Cir. 1968).

1. *Carey v. Population Services*

For a number of reasons, the Eleventh Circuit's conclusion that *Carey's* footnotes constitute a doctrinal development is ill-founded. First, the only aspect of the right of privacy applied in *Carey* was "[t]he decision whether or not to beget or bear a child." 430 U.S. at 685. The Court repeatedly emphasized this. *Id.* at 686-88. In footnote 5, five members of the Court limited the effect of the decision to "state regulation . . . only when it 'burden[s] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision.' [cit. omitted.]" The Court expressly declined to address "state regulation . . . 'whenever it implicates sexual freedom' . . . or 'affect[s] adult sexual relations.'" *Id.* at 688 n. 5. Obviously, the aspect of privacy at issue in *Carey* did not concern homosexuals.

Second, the remark that the "outer limits" of one aspect of privacy "have not been marked by the Court," *id.* at 684-85, in no way casts doubt on the authority of *Doe v. Commonwealth's Attorney*. As Judge Kravitch observed in her dissent below, this statement "simply acknowledges the fact that the Court has not yet passed on the validity of many kinds of state statutes regulating sexual conduct," citing as an example Georgia's fornication statute. O.C.G.A. § 16-6-18 (1984); *Hardwick*, 760 F.2d at 1215 (Kravitch, J., dissenting) (Cert. App. at 32). Third, footnote 17 in *Carey* does not even remotely ad-

dress the issues sub judice. The context of that footnote was that it had been argued by those defending New York's restrictions on minors' access to contraceptives that significant state interests were served because "free availability to minors of contraceptives would lead to increased sexual activity among the young in violation of the policy of New York to discourage such behavior." *Id.* at 694. The appellees in *Carey* had argued, however, that the state's policy to discourage sexual conduct by minor's was itself unconstitutional. At that point, the Court interposed footnote 17 which merely explained that the Court was not willing to expand the right of privacy as far as had been urged by the appellees. It is difficult, at best, to see how this footnote could be interpreted as a statement by this Court that it is now an open qustion as to whether the right of privacy invalidates all state statutes regulating any kind of private sexual conduct, much less consensual homosexual sodomy.

Fourth, this Court has recently warned against over-reliance on the language contained in its footnotes. In *Wainwright v. Witt*, — U.S. —, 105 S.Ct. 844 (1985), the Court stated that its footnotes in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), were only dicta and "not controlling." *Id.* at 851. *See also McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981). It is urged that this observation is equally applicable here, especially where the reliance on footnotes is in derogation of a previous precedent of this Court on the merits of issues not involved in the case wherein the footnotes appear.

Perhaps a stronger argument for reliance on one of this Court's footnotes can be made where the note deals more specifically with the subject matter at hand. For

example, in *Rose v. Locke*, 423 U.S. 48, 50 n.3 (1975), a majority of this Court indicated that at least one of the activities proscribed by Georgia's statute (cunnilingus) was not a fundamental right requiring special judicial scrutiny.

2. *New York v. Uplinger*

The majority opinion below concluded that this Court's dismissal of certiorari in *New York v. Uplinger*, *supra*, provided an indication that the constitutional questions presented by Michael Hardwick are open for consideration "by the Supreme Court and by this Court." *Hardwick*, 760 F.2d at 1210. (Cert. App. at 21). While this observation may have been true as to this Court's ability to reconsider its own decisions, the majority below missed the mark as to its own ability to reject a precedent of the Supreme Court. Nonetheless, based upon the statement by this Court that the *Uplinger* case provided "an inappropriate vehicle for resolving the important constitutional issues raised by the parties," *Uplinger*, — U.S. —, 104 S.Ct. at 2334, the majority below inferred that one of the important issues was whether a right of privacy requires the invalidation of sodomy statutes, and that this Court's intention was to reverse, or at least reconsider, *Doe v. Commonwealth's Attorney*. The issues raised in *Uplinger* were vagueness, overbreadth, First Amendment, equal protection and due process. As noted by Judge Kravitch, the per curiam dismissal of the writ did not identify which of these issues were considered important. *Hardwick*, 760 F.2d at 1216 n. 10 (Kravatch, J., dissenting) (Cert. App. at 34).

Moreover, even the majority below recognized that the state court decision in *Uplinger* was subject to varying

interpretations which made it difficult to determine exactly which federal constitutional issues had been decided. *Id.* at 1210 (Cert. App. at 20). This certainly appears to be incongruent with the strong assertion of the majority below that this court was prepared in *Uplinger* to address the constitutionality of state sodomy statutes. It is suggested that the holding of this Court in *Uplinger* was that a precise federal constitutional issue could not be identified for consideration and that this was the reason for dismissing the writ of certiorari. In any event, *Uplinger* gave no indication that this Court was about to overrule *Doe v. Commonwealth's Attorney.*

3. *Other decisions*

While petitioner would not presume to suggest that this Court would in any way be impeded from reconsideration of *Doe's* summary affirmance, it seems worthy of note that many courts have expressed confidence in the validity of *Doe's* precedent since the *Carey* decision *and* the dismissal of certiorari in *Uplinger.* In *Carey* itself, Justice Rehnquist, in dissent, stated that, footnote 17 notwithstanding, *Doe v. Commonwealth's Attorney* was a definitive decision on the "facial constitutional validity of criminal statutes prohibiting certain consensual acts." *Id.* at 718 n. 2 (Rehnquist, J., dissenting). Moreover, as the Ninth Circuit observed in *Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980), "[m]ost federal courts, on the other hand, have understood the holding [in *Doe v. Commonwealth's Attorney*] to be that homosexual conduct does not enjoy special constitutional protection under the due process clause." *Id.* at 809-10. The Ninth Circuit in *Beller* cited an impressive array of cases, which will not be repeated here, in support of this proposition.

More recently, the Court of Appeals for the District of Columbia in *Dronenberg v. Zech,* 741 F.2d 1388, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984) (en banc), found that *Doe* remained a binding precedent, even after full consideration of *Griswold, supra,* and its progeny, including *Carey.*

The Fifth Circuit in *Baker v. Wade,* 769 F.2d 289 *reh'g denied* 774 F.2d 1287 (5th Cir. 1985) (en banc), recently reversed a Texas district court decision invalidating a homosexual sodomy statute on privacy and equal protection grounds. The Court adopted the view stated in *Dronenberg* and by Judge Kravitch in her dissent below.

Finally, it should be noted that Judge Merhige of the Eastern District of Virginia, who filed the dissent in the original three-judge proceeding in *Doe v. Commonwealth's Attorney,* recently acknowledged its continuing efficacy in *Doe v. Duling,* 603 F.Supp. 960 (E.D.Va. 1985), stating that ". . . Virginia's sodomy statute as applied to adult males who consensually engage in homosexual sodomitic activity in privacy is a constitutional exercise of state power." *Id.* at 965 (dicta).

In summary, the majority below made unwarranted assumptions and drew prohibited inferences in its efforts to validate its rejection of *Doe v. Commonwealth's Attorney.* It is respectfully urged that the tortuous roadmap laid out by the court below enroute to its predetermined destination is too convoluted to be followed without error. The plain language of *Hicks v. Miranda,* 422 U.S. 332 (1975), lays out a much straighter path. Summary affirmances are binding on lower courts until the Supreme Court informs that they are not. *Id.* at 344-45. It is respectfully urged that this admonition has not been heeded by the majority below.

II. The Court Below Erred In Concluding That Georgia's Sodomy Statute Infringes Upon The Fundamental Rights Of Homosexuals And In Requiring The State Of Georgia To Demonstrate A Compelling State Interest In The Prohibition Of Sodomy In Order To Support The Constitutionality Of The Statute.

The majority below, once it had dispensed with *Doe v. Commonwealth's Attorney,* went on to examine the question of whether Petitioner Bowers and the other Defendants were entitled to dismissal on some ground other than the precedent of *Doe.* If it were to conclude that the sodomy statute was to be tested only by minimal judicial scrutiny, and if Hardwick could not prove that the law was not rationally related to a legitimate state purpose, the district court's dismissal could stand. *Hardwick,* 760 F.2d at 1211 (Cert. App. at 22).

The court below, however, concluded that Georgia's sodomy statute infringes on fundamental constitutional rights of Michael Hardwick, i.e., a fundamental right of privacy and a constitutionally protected right of intimate association. This conclusion goes far beyond any intimation by this Court of the extent to which the Constitution affords such protection.

A. The Right Of Privacy.

That there exists a right of personal privacy under the Constitution is not questioned by Petitioner. Though this right is not articulated textually in the Constitution, it is said to emanate from the penumbras of the First, Fourth, Fifth and Ninth Amendments, and the concept of liberty embodied in the Fourteenth Amendment. *Roe v. Wade,* 410 U.S. 113, 152 (1973), and cases cited therein.

However, the court below, in its expansive view of the right of privacy, failed to recognize the historical view of this Court that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy." *Roe*, 410 U.S. at 152.

Thus far, this Court has recognized that the right of privacy extends to activities relating to marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967), and other familial relationships, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); decisions relating to whether to conceive or bear a child, *City of Akron v. Akron Center for Reproductive Health*, 462 U. S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It is certainly not argued here that these zones of privacy should not be considered fundamental or implicit in the idea of ordered liberty.

However, the lower court has taken an activity which for hundreds of years, if not thousands, has been uniformly condemned as immoral, and labeled that activity as a fundamental liberty protected by the Constitution in the same manner as are the intimacies of marriage. The court below finds strength for this conclusion in the fact that the activity in this case is alleged to occur in Hardwick's home between consenting adults.

While the right of privacy may have its aegis in the penumbras of the Bill of Rights or the due process clause of the Fourteenth Amendment, there must, at some point, be some basis for cataloging a particular activity under the protection of that right. No such basis exists for adding the crime of sodomy to the list of fundamental rights thus far recognized by this Court.

Obviously, there is no textual support in the Constitution or laws of the United States for the proposition that sodomy is a protected activity. Nor can it be said that the lower court's reasoning was based on some absolute truth or ethic engrained in American philosophy and which rises above the Constitution. It simply cannot be said that the lower court's decision was based upon the Natural Law referred to by Jefferson in the Declaration of Independence. No universal principle of morality teaches that homosexual sodomy is acceptable conduct. To the contrary, traditional Judeo-Christian values proscribe such conduct. Indeed, there is no validation for sodomy found in the teaching of the ancient Greek philosophers Plato or Aristotle.[2] More recent thinkers, such as Immanuel Kant, have found homosexual sodomy no less unnatural.[3]

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[2]Plato, *Laws*, 636 C quoted in R. Reilly, *Homosexual Rights and The Foundations of Human Rights*, infra n. 20; ("The intercourse of men with men, or of women with women, is contrary to nature, and . . . the bold attempt was originally due to unbridled lust.") *See also* Aristotle, *Nicomachean Ethics*, VII, 5:1-3, 1148(b), 15-30 (Oxford trans.), M. Hamburger, *Morals and Law, The Growth of Aristotle's Legal Theory*, 87 (1951).

[3]I. Kant, *Lectures on Ethics*, 170 (L. Infield trans. 1963).

Nor can it be said that support for the lower court's conclusion may be found in the legal traditions of our society. Justice Powell, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), identified tradition as a pedigreed guide to the identification of fundamental rights. To find this tradition and the roots of modern conventional morality and law relative to the crime of sodomy, only a brief historical review is necessary. Sodomy was proscribed in the laws of the Old Testament (Leviticus 18:22) and in the writings of St. Paul (Romans 1:26, 27; 1 Corinthians 6:9, 10). Sodomy was a capital crime in ancient Rome under the Theodosian law of 390 A.D.[4] and under Justinian.[5] Sodomy was proscribed by the teachings of St. Thomas Aquinas.[6] Sodomy was prosecuted as heretical in the ecclesiastical courts throughout the Middle Ages.[7] During the English Reformation when powers of the ecclesiastical courts were transferred to the King's courts, the first English statute criminalizing sodomy was passed.[8]

In the first half of the 17th Century, Lord Coke expounded upon the crimes of buggery and sodomy, noting

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[4]D. Bailey, *Homosexuality in the Western Christian Tradition* 70-81 (1975).

[5]Bailey, *supra* n.4, at 73-75, *quoting* Justinian, *Novellae* 77, 141.

[6]Summa Theologica II-II, Q Cliv. I, II and XII. D. Richards, *Unnatural Acts and the Constitutional Right to Privacy*, 45 Fordham L. Rev. 1281, 1296 (1977).

[7]*See* W. Barnett, *Sexual Freedom and the Constitution* 80-81 (1973); Bailey, *supra* n.4, at 135; and D. Richards, *supra* n.6 at 1296-97.

[8]25 Hen. VIII, c.6 (1533) (repealed by 9 Geo. IV 31 (1828)); *see also* 5 Eliz. I, c.17 (1562). *See* Barnett, *supra* n.7, at 81.

that the "ancient authors doe conclude, that it deserveth death, *ultimum supplicium,* though they differ in the manner of punishment."[9] Blackstone considered "the infamous crime against nature" as an offense of "deeper malignity" than rape, and an act so heinous, "the very mention of which is a disgrace to human nature," "a crime not fit to be named."[10]

Coke's *Institutes* and the *Commentaries* were studied by colonial lawyers in America. The popularity of Coke in the colonies and the significance of that popularity was recognized by this Court in *Payton v. New York,* 445 U.S. 573, 594 n. 36 (1980). Two thousand five hundred copies of the *Commentaries* were sold in America before the Revolution, and a subscription reprint was published in Philadelphia between 1771 and 1772. "John Adams, Esq., Barrister at Law, Boston, Massachusetts Bay," was among the subscribers.[11]

In Georgia, the common law of England in force prior to May 14, 1776, was adopted as the law of the state by an act of the General Assembly approved February 25, 1784 (Prince's 1837 Digest 570; *see also* Cobb's 1851 Digest 720).

In 1816, the crimes of sodomy and bestiality were made punishable in Georgia by life imprisonment at hard

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[9]Coke, *Third Part of the Institutes of the Laws of England* at 58-59 (Brooke ed. 1797).

[10]4 W. Blackstone, *Commentaries* 215.

[11]R. Pound, *The Development of Constitutional Guarantees of Liberty* 61 (1957).

labor (Lamar's Laws of Georgia, 1810-1819, at 571, § 35) and have continuously been statutory crimes ever since.[12]

While Respondents correctly note that 22 states have legislatively decriminalized homosexual sodomy (Brief in Opposition to Petition for Certiorari at 12, n. 6), 25 states and the District of Columbia continue to maintain criminal statutes against this conduct.[13] New York and Pennsylvania have judicially decriminalized homosexual sodomy. *People v. Onofre*, 51 N.Y.2d 476 (1980); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980). Thus, neither the legal nor moral traditions of this nation can provide the necessary support for the recognition of consensual sodomy as falling within that class of rights deemed fundamental or implicit in the concept of ordered liberty. Tradition provides no basis for protecting this activity under the guise of a right of privacy.

One other possible source of authority for judicial recognition of a fundamental right of privacy to engage in homosexual sodomy is the "consensus rationale" discussed by some legal scholars. *See, e.g.*, Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 243-49

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[12]Ga. Laws 1833, Cobb's Digest, 1851, p. 787; Code 1863, §§ 4251, 4252; Code 1868, §§ 4286, 4287; Code 1873, §§ 4352, 4353; Code 1882, §§ 4352, 4353; Penal Code 1895, §§ 382, 383; Penal Code 1910, §§ 373, 374; Code 1933, §§ 26-5901, 16-5902; Ga. Laws 1949, p. 275, § 1; Code 1933, § 26-2002, enacted by Ga. Laws 1968, p. 1249, § 1.

[13]Alabama, Arizona, Arkansas, District of Columbia, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia; J. Lorence, *Sodomy Laws, Right of Privacy and the Courts*, printed in Magnusen, *Are Gay Rights Right? A Report on Homosexuality and the Law* 83-90 (1985).

(1973). A review of the decision below excludes this theory as a possible basis. The Court below did not disclose any consensus of thought in this nation which contradicts the legislative judgment of the General Assembly of Georgia concerning the moral or other reasons for prohibiting sodomy.

While the court below attempted to use this Court's prior decisions on the right of privacy as a basis for its opinion, it did so without any deference to their subject matter context, and it failed to give any effect whatsoever to this Court's indication in *Rose v. Locke*, 423 U.S. 48, 50 n.3 (1975), that the act of cunnilingus is not considered to involve a fundamental right. Rather, the court below found that homosexual sodomy was protected by the Ninth Amendment and the Fourteenth Amendment's concept of liberty. *Hardwick*, 760 F.2d at 1212 (Cert. App. at 26).

The Ninth Amendment's guarantee that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" was, as Justice Goldberg observed in *Griswold*, a recognition by the framers that fundamental rights exist which are not enumerated in the first eight amendments, and that these unenumerated rights should be protected. Obviously, since these rights are unenumerated, if they are to be protected they must first be identified. The same, of course, is true for those fundamental liberties protected by the Fourteenth Amendment but not specifically enunciated in the Bill of Rights. In performing this task of identifying which rights are fundamental, Justice Goldberg instructed that:

> . . . judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look at the "traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105. . . .

Griswold, 381 U.S. at 493 (Goldberg, J., concurring).

The court below has ignored the traditions and collective conscience of this nation. By concluding that homosexual sodomy, for some, serves the same purpose as the intimacy of marriage, *Hardwick*, 760 F.2d at 1212 (Cert. App. at 24), it has lowered the estate of marriage, which has traditionally been held an institution worthy of the protection and nurture of the State, to merely another alternative for sexual gratification. This court in *Zablocki v. Redhail*, 434 U.S. 374 (1978) recognized marriage as the "foundation of the family and of society, without which there would neither be civilization nor progress. . . ." *Id.* at 384, *quoting Maynard v. Hill*, 125 U.S. 190, 211 (1888). Marriage and the family are certainly within a zone of privacy which did, at the time the Constitution was ratified, and does now, transcend the enumerated rights. The common principles of this Court's privacy decisions have revolved around marriage, the family, the home and decisions as to whether through procreation the ancient cycles will begin again and, if so, in what manner the new generation will be brought up. These rights have always been with us, and are part of us. Sodomy is not now and has never been a right, fundamental or statutory, in existence to be "retained by the people" under the Ninth Amendment. Nor can it be said that sodomy was considered to be an unenumerated but inherent liberty recog-

nized at the time the Fourteenth Amendment became part of the law of this land. It is not a part of our traditional values or conventional morality.

B. Homosexual Sodomy Is Not Protected By The Home.

The court below attempts to bolster its conclusion with the observation that Hardwick intends to commit sodomy in his home, citing *Payton v. New York*, 445 U.S. 573, 589-90 (1980), and *Stanley v. Georgia*, 394 U.S. 557 (1969). *Payton* held unconstitutional the *physical* entry into private residences to effect routine felony arrests in the absence of warrants, exigent circumstances, or consent. While *Payton* does recognize the importance of the home as a situs in which an individual may be free from unreasonable governmental intrusion, this Court made it quite clear that the home was not an inviolable haven for crime or criminals. As Justice Harlan noted in his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961):

> . . . [I]t would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not absolute. Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal inquiry, however privately practiced. So much has been explicitly recognized in acknowledging the state's rightful concern for its peoples' moral welfare. See 367 U.S. at pp. 545-548, *supra*.

Id. at 552-53 (Harlan, J., dissenting).

Stanley, supra, held simply that the First and Fourteenth Amendments prohibit making the private possession of obscene material in one's home a crime. However,

the basis for the Court's opinion was rooted in the First Amendment right to receive information and ideas and the absolute prohibition, founded in the First Amendment, against attempts by the government to control the moral content of a person's thoughts.

Georgia's sodomy statute does not purport to control men's minds or inhibit their freedom of expression. It is directed toward an act which is in itself immoral. Even so, the Court has clearly indicated that where "speech" or the expression of ideas involves the commission of *acts* the scope of permissible regulation by the state significantly increases. In *United States v. O'Brien,* 391 U.S. 367 (1968), the Court declined to accept the notion that conduct is always protected "speech" whenever the person intends thereby to express an idea. *See also California v. LaRue,* 409 U.S. 109, 117, 118 (1972); *Miller v. California,* 413 U.S. 15, 26 n.8 (1973); *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969). It is submitted that homosexual sodomy as an act of sexual deviancy expresses no ideas. It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong.

The reason *Stanley* is inapplicable here is that sodomy does not enjoy the status of a fundamental right. While individuals are free to live and make fundamentally private decisions in their homes concerning marriage, procreation, child rearing, education, and indeed, the content of one's own library and his most personal thoughts, other activities which are not fundamental rights, but which might also take place in the home, are not and cannot be free from proper regulation. Otherwise, the states would

be unable to meet their obligations under the police power in a myriad of circumstances. As Chief Justice Burger pointed out in *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 68 n.15 (1973), there are numerous laws prohibiting such acts as prostitution, suicide, voluntary self-mutilation, and bigamy which are practiced by or among consenting adults, more often than not in secret. Under the Eleventh Circuit's rationale, perhaps none of these actions could be reached by the State if they perchance occur within the confines of someone's home.

It is not so much the place where any given activity occurs that determines whether the activity is protected as a fundamental right as it is the nature of the activity itself. This is not to say that the people are not entitled to look upon their home as their "castle" and be secure there from unreasonable governmental intrusion. The Fourth Amendment articulates this fundamental right. *Payton, supra; Stanley* 94 U.S. at 569-76 (Stewart, J., concurring). Petitioner has no quarrel, of course, with the principles enunciated by the Fourth Amendment or this Court's interpretations of that part of our constitution. The citizens' rights under the Fourth Amendment are quite properly "fundamental." However, those activities which are not specifically protected under the Constitution, and which do not fall within those zones of privacy thus far enunciated by this Court, should not be protected, necessarily, by an arbitrary delineation of privacy at the front doorstep of an individual's house. The right of privacy in the home is not absolute. *Poe v. Ullman,* 367 U.S. 497, 552 (Harlan, J., dissenting).

Justice Blackmun recognized in *Roe v. Wade,* 410 U.S. 113, 154 (1973), that there are limits on the right of privacy

and indicated that lines must be drawn in recognition of those limits. Where the nature of the activity is examined to determine whether it is deserving of constitutional protection as a fundamental right of privacy based upon the traditions of our society, then the line marking the limits undoubtedly will be properly drawn. But where, as in the court below, the nature of the activity is disregarded, and the activity is deemed fundamental only because of where it takes place, the line becomes a gerrymandered scrawl.

C. Homosexual Sodomy Is Not Protected By A Constitutional Right Of Association.

The court below found that the conduct Hardwick engages in is "quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation," and placed homosexual sodomy, at least for some, on the same plane as the intimacies of marriage. *Hardwick*, 760 F.2d at 1212 (Cert. App. at 24). Again, the lower court has made an inferential leap well beyond any previous delineations marked by this Court.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), this Court struck down on due process grounds an ordinance which limited the occupancy of a dwelling to members of a single family composed of only a few categories of related individuals. The Court distinguished its previous decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which upheld an ordinance limiting occupancies to traditional families or to groups of not more than two unrelated persons, solely on the ground that the *Belle Terre* ordinance affected unrelated individuals. It allowed occupancy by all who were related by blood, adoption, or marriage.

Justice Powell, writing for the plurality in *Moore*, recognized the right of individuals to be free from governmental intrusion in decisions relating to marriage and family life, and used as a guide the teachings of history and the basic values of society to conclude that the Constitution protects the sanctity of the family, even the extended family, "precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore*, 431 U.S. at 503-04. There are no inconsistencies between *Moore* and *Belle Terre, supra*. Together they mark a limitation on the right of privacy and intimate association in the realm of cohabitation to that of the family.

In their brief in opposition to the writ of certiorari, however, Respondents relied on this Court's recent decision in *Roberts v. United States Jaycees*, — U.S. — , 104 S.Ct. 3244 (1984), wherein this Court held that the associational freedoms asserted by the Jaycee organization were not sufficient to preclude application of the Minnesota Human Rights Act. Of course, under the act and this Court's decision, the organization was required to accept women in its membership. The type of associational interest most directly involved in *Roberts* was quite clearly that relating to the right to associate for expressive, First Amendment, purposes. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). However, it was concluded by this Court that even that kind of associational freedom is not absolute, and may be infringed upon for compelling state interests. *Roberts*, — U.S. at — , 104 S.Ct. at 3252.

The associational interests claimed by Michael Hardwick are quite dissimilar to those asserted by the United States Jaycees or the interests discussed by Justice Brennan in Part II A of the *Roberts* opinion. After discussing the importance of protecting certain personal relationships because of their "critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . ." and the "realization that individuals draw much of their emotional enrichment from close ties with others," *id.* at — , 104 S.Ct. at 3250, Justice Brennan stated that:

> [t]he personal affiliations that exemplify these considerations, and *that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection* are those that attend the creation and sustenance of a family-marriage, e.g., *Zablocki v. Redhail, supra; childbirth,* e.g., *Carey v. Population Services, Int'l, supra;* the raising and education of children, e.g., *Smith v. Organization of Foster Families, supra* [431 U.S. 816 (1977)] and cohabitation with one's relatives, e.g., *Moore v. City of East Cleveland, supra. Family* relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . Only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Id. at —, 104 S.Ct. at 3250-51 (emphasis added).

Georgia's sodomy statute does not infringe on any of these values. It applies exclusively to an act found by the General Assembly of Georgia to be immoral. It does

not impact upon an individual's First Amendment freedom to cultivate and transmit even unpopular ideas or political doctrines. It does not tell individuals who their friends may or may not be, or with whom they may spend their time, worship, work, or engage in legitimate yet personal discourse. The statute most certainly does not interfere with personal decisions concerning marriage or family life, the raising of children or their education, or which members of a family will be permitted to live together.

There are and must be limits upon this right of intimate association, as Justice Brennan indicated. Otherwise, a multiplicity of areas in which the states and the national government have exercised regulatory power would be removed from regulation under the guise of association. Perhaps polygamy is the best example. In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court upheld a congressional enactment making bigamy a crime in the territories. The Court noted that polygamy was historically abhorred in northern and western Europe and that at common law a second marriage was void. The Court recounted the ecclesiastical prosecutions in England for this crime and the post-reformation English statutory treatment, noting that the penalty was death. The Court traced this crime through colonial times to the time of that opinion. Against the claim that polygamy was a valid free exercise of religion, the Court found that "laws are made for the governance of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. But perhaps more important than this was the Court's reasoning as to the justification for polygamy statutes. The Court noted that traditional

marriage is the bedrock of society, the essential and elementary unit upon which even government depends. Polygamy, the Court concluded, would upset the necessary balance provided by the traditional entity, to the general detriment of society. The protection of the "organization of society" was found valid against contrary religious views. Otherwise, the Court specifically noted, religious beliefs would subjugate the law, and permit each individual to become a law unto himself. *Id.* at 167. *Cf. Bob Jones University v. United States,* 461 U.S. 574, 603 (1983); *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978). *See also Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985).

Respondents claim that Hardwick's associational interest, wrapped in the lower court's privacy analysis, precludes Georgia from prohibiting sodomy as an act. This errant logic would lead to the conclusion that polygamy may not be prohibited. Certainly, the elements of an "association" of individuals are present in polygamy. Aside from possible religious justifications, it could also be argued that polygamy might provide the source of certain "emotional enrichment," *Roberts, supra,* — U.S. at — , 104 S.Ct. at 3250. It could also be argued that the benefits of "intimate association" may be present in consensual incest. It could be said that for some, liaison with prostitutes, commercial aspects notwithstanding, provide a similar sexual experience to that of marriage. Indeed, the same could be said for adultery or fornication. However, none of these activities, nor any associational aspects relating to them, can be said to have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . ." fostering

diversity or "act[ing] as critical buffers between the individual and the power of the state." *Id.* at 3250.

It is, therefore, submitted that homosexual sodomy does not fall within those categories of activities protected by a right of intimate association or a more general fundamental right of privacy. Since no fundamental right is involved, all that need be shown by the State of Georgia is that the statute is not arbitrary and bears a "rational relationship" to a legitimate state purpose. *Compare Village of Belle Terre v. Boraas,* 416 U.S. at 8, *with Roe v. Wade,* 410 U.S. at 155. Thus, the Eleventh Circuit erred in imposing the "compelling state interest" standard of review on Georgia's sodomy statute.

D. Considerations Of Federalism: Traditional Morality And Other Legitimate State Interests.

Respondents would have this Court strike morality from the legitimate areas in which the States may act. Yet this Court and other federal courts have many times held that morality and decency constitute legitimate and compelling state interests. *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Near v. Minnesota,* 283 U.S. 697, 716 (1931); *Doe v. Commonwealth's Attorney, supra; Dronenberg v. Zech,* 741 F.2d 388, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984); *Baker v. Wade,* 769 F.2d 289, *reh'g denied,* 774 F.2d 1287 (5th Cir. 1985) (en banc).

In *Noble State Bank v. Haskell,* 219 U.S. 104 (1910), Justice Holmes, in expounding upon the police power of the States, stated as follows:

> It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States,* 167 U.S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and proponderant opinion to be greatly and immediately necessary to the public welfare.

Id. at 111. More recently, Justice Douglas stated that "[p]ublic safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Berman v. Parker,* 348 U.S. 26, 32 (1954) [citing *Noble State Bank, supra*].

As Justice Powell has stated, "the State, representing the collective expression of moral aspirations, has an undeniable interest in insuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki v. Redhail,* 434 U.S. 374, 399 (1978) (Powell, J., concurring). In *Paris Adult Theater I,* 413 U.S. 49 (1973), Chief Justice Burger recognized that "there is a 'right of the nation and of the States to maintain a decent society. . . .'" *Id.* at 60-61, *quoting Jacobellis v. Ohio,* 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting). Moreover, the Court in *Paris Adult Theater I* made it clear that it is not for the judiciary to decide "empirical uncertainties" concerning state legislation, except where the Constitution plainly provides protection for a fundamental right. The Court expressly found that legitimate "unprovable assumptions" may be acted upon by both the courts and legislatures in order to protect social interests in morality. *Id.* at 60-61. Following this reasoning, the district

court in *Doe v. Commonwealth's Attorney* concluded Virginia was not required to show that moral delinquency actually results from homosexuality, but that the conduct would be likely to contribute to moral delinquency. In Georgia, it is the very act of homosexual sodomy that epitomizes moral delinquency. This is a choice which has been made by the representatives of the people of this State, based upon the traditional moral values of society. A similar choice was made by Congress in its decision to exclude homosexual aliens. *See Boutilier v. Immigration and Naturalization Service,* 387 U.S. 118 (1967).

The Court of Appeals for the Fifth Circuit has recently stated that moral issues should be resolved by the people and not by the federal judiciary. *Baker v. Wade,* 774 F.2d 1287 (en banc), *denial of rehearing in* 769 F.2d 289 (5th Cir. 1985). *See also Dronenberg v. Zech,* 741 F.2d 1388, 1397 (D.C. Cir. 1984). If morality is a legitimate state purpose, the identification of that morality, "the widely held values" of the people, should be voiced through their representatives. The legislative process is acutely designed for this purpose, whereas the judiciary may be inclined to make determinations based upon more empirical evidence, to which this area is not particularly amenable. *See Paris Adult Theater I, supra.* For example, it should be permissible for the General Assembly to find as legislative fact that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few.[14] Homosexual sodomy is often practiced outside the home such as in public parks, rest-

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[14]K. Jay and A. Young, *The Gay Report* 563-64. (Summit 1979).

rooms, "gay baths," and "gay bars"[15] and is marked by the multiplicity and anonymity of sexual partners,[16] a disproportionate involvement with adolescents,[17] and, indeed, a possible relationship to crimes of violence.[18] Similarly, the legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases such as anorectal gonorrhea, Hepatitis A, Hepatitis B, enteric protozoal diseases, and Cytomegalovirus,[19] and the concomitant effects of this relationship on the general public health and welfare.

But perhaps the most profound legislative finding that can be made is that homosexual sodomy is the anathema of the basic units of our society — marriage and the family. To decriminalize or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institu-

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[15]Jay and Young, *supra* note 14, at 500-501.

[16]A. Bell & M. Weinberg, *Homosexuality: A Study of Diversity Among Men and Women* 309 (1978).

[17]Jay & Young, *supra* note 14, at 275.

[18]Cameron, *Report on Homosexuality and Murder, Institute for the Scientific Investigation of Sexuality* (1984); as a possible example, *see Conklin v. State*, 254 Ga. 558, — S.E.2d — (1985).

[19]Landesman, et al., "Special Report: The AIDS Epidemic," 312 New Eng. J. Med. 521 (Feb. 21, 1985); Babb, "Sexually Transmitted Infections in Homosexual Men," Post Grad Med. J., No. 3 at 215, 216 (1979); Handsfield, "Sexually Transmitted Diseases in Homosexual Men," 71 Am. J. Pub. Health 989 (1981); Corey & Holmes, "Sexual Transmission of Hepatitis A in Homosexual Men," 302 New Eng. J. Med. 435, 437 (1980); William, "The Sexual Transmission of Parasitic Infections in Gay Men," 5 J. Homosexuality, 291, 292 (1980); Lange, et al., "Cytomegalovirus Isolation from Healthy Homosexual Men," 252 J.A.M.A. 1908, 1910 (1984).

tions to merely other alternative lifestyles. One author has described that result as the promotion of indifference toward these foundations of social order, where historically there has been endorsement. "Since that endorsement was purported to be based upon knowledge of the objective good of marriage, it taught not only that marriage was good, but that we can know what is good. The latter is, in a way, a far more critical lesson."[20] *See also Moore v. City of East Cleveland,* 431 U.S. at 503-04; *Zablocki,* 434 U.S. at 385-86.

Justice Douglas said marriage "is an association that promotes a way of life, not causes. . . ." *Griswold,* 381 U.S. at 486. If the legal distinctions between the intimacies of marriage and homosexual sodomy are lost, it is certainly possible to make the assumption, perhaps unprovable at this time, that the order of society, our way of life, could be changed in a harmful way. The states have a legitimate and, it is submitted, compelling interest in the protection of the organization of society. *See Reynolds v. United States, supra.*

The court below, however, has obliterated that distinction through the judicial creation of a new fundamental right. It has gone beyond the text of the Constitution or the penumbras of the Bill of Rights. It would, without any adherence to the traditions, historical values of our nation, or the contemplations of the Constitution's framers, hold the will of the people of Georgia at bay. It has recited Fourteenth Amendment "liberty" but has bowed

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[20]R. Reilly, *Homosexual Rights and the Foundations of Human Rights,* reprinted in Rueda, *The Homosexual Network,* (1982) from "Family Policy Insights" (Dec. 10, 1981).

to the temptation Justice Holmes warned against in *Lochner v. New York,* 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) by placing its opinion above that of the representatives of the people without the support of "fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 76 (Holmes, J., dissenting).

Petitioner does not dispute this Court's power to define emerging rights under the Fourteenth Amendment or the Ninth Amendment. But such rights must be rooted in the traditions and moral values of our people. These values cannot be subjected to deliberate change by judicial action, although the contours of these values may develop over the course of time by the people themselves. Adherence to these values supplies the necessary stability in the formulation of constitutional doctrine under the Fourteenth Amendment and avoids unnecessary strains in our federalism. Such an approach precludes the appearance of a unilaterally imposed modification to the social contract and gives due regard for the collective will of the people. This has not been done by the Eleventh Circuit in this case.

CONCLUSION

As indicated above, Petitioner does not contest that Liberty embodies certain inherent rights not enunciated in the Constitution, or that these rights are protected by the Ninth or Fourteenth Amendments. But, as Judge Learned Hand once said, liberty ". . . is not the ruthless, the un-

bridled will; it is not freedom to do as one likes. That is the denial of liberty and leads straight to its overthrow." Hand, *The Spirit of Liberty* 189-90 (Dillard ed. 1952). Rather, true liberty can be found in the traditions and conscience of our people.

The tradition and conscience of the people of Georgia have been expressed in Georgia's sodomy statute. This conscience draws the necessary distinction between liberty and licentiousness, a distinction left utterly unobserved by the court below. For the reasons stated above, the judgment and order of the Court of Appeals should be reversed.

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No. 85-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

BRIEF FOR RESPONDENT

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No. 85-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral. On August 3, 1982, Georgia exercised this "police power" over personal morality by arresting 29-year-old Respondent Michael Hardwick in his own bedroom, and charging him with committing the crime of "sodomy" with another consenting adult in that very room. The crime of "sodomy," punishable by imprisonment for up to twenty years, is defined by Georgia law as "any sexual act involving the sex organs of one person and

the mouth or anus of another." Official Code of Georgia Annotated ("O.C.G.A.") Section 16-6-2 (1984).[1] The statute applies to all persons, whether married or single, heterosexual or homosexual, and to all the described acts, even when conducted in private between consenting adults.[2]

Hardwick has as yet had no chance to challenge the constitutional validity of the statute in a state criminal proceeding, because the State has thus far declined to present his case to a grand jury. Jt.App. 8.[3] But pursuant to the Georgia four-year statute of limitations for felonies of this sort, O.C.G.A. Section 17-3-1(c), Hardwick remains subject to prosecution for the charged offense.

Hardwick therefore filed suit in the Northern District of Georgia on February 14, 1983. His complaint sought a declaratory judgment that the Georgia sodomy law is unconstitutional as applied to private sexual conduct between consenting adults. Jt.App. 6-7.

Rather than denying any of Hardwick's allegations, defendants moved to dismiss under Fed.R.Civ.P. 12(b)(6). The district court ruled that Hardwick had standing, but disposed of his constitutional claims in two sentences, by the citation, without more, of this Court's summary affirmance in *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). App. 2-3.

[1] Section 16-6-2 was challenged below only insofar as it criminalizes private, consensual adult sodomy. *See* Jt.App. 6 (Complaint, ¶ 17). Not at issue in this case, of course, is that part of Section 16-6-2 criminalizing sodomy by force as "aggravated sodomy." Hereafter, only the challenged part of Section 16-6-2 will be meant when the term "Section 16-6-2" is used, unless otherwise noted.

[2] Although the State of Georgia in its brief defends the statute only insofar as it criminalizes "*homosexual* sodomy," *see, e.g.*, Brief of Petitioner at 20, 21, 23, 24, 25, 26, 27, 29, 34, 36, 37, 38 (emphasis added), the statute is in no way so limited. Indeed, Georgia is among the 19 states that outlaw *all* acts of "sodomy," in contrast to the handful of jurisdictions that criminalize only homosexual acts, *see* Ark. Stat. Section 41-1813; Kan. Stat. Section 21-3505; Mont. Rev. Code Section 94-5-505; Nev. Rev. Stat. Section 201.190; Tex. Penal Code Section 21.06.

[3] References to the Joint Appendix will be styled "Jt.App. ____." References to the Appendix to the Petition for Certiorari will be styled "App. ____."

The Court of Appeals for the Eleventh Circuit reversed the district court's dismissal, holding that the statute implicates fundamental constitutional rights by regulating citizens' conduct in their own bedrooms, and involves none of the "public ramifications" that attend "sexual activity with children or with persons who are coerced either through physical force or commercial inducement." App. 26. Indeed, the court held, "[t]he activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." *Id.*

Even so, the Court of Appeals did not declare the statute unconstitutional or enjoin its enforcement. It merely remanded for a trial and directed that, because state invasion of the home to regulate such private intimacies is constitutionally troublesome, "the State must demonstrate a compelling interest in restricting this right[,] and must show that the sodomy statute is a properly restrained method of safeguarding its interests." App. 22. Nor, as the court below ruled after careful examination of this Court's precedents, did this Court's summary action in *Doe* v. *Commonwealth's Attorney* preclude that standard of review upon remand. App. 12-21.[4] Thus all that is at

[4]Regardless of whether the lower court was correct in the significance it attributed to the summary affirmance in *Doe*, such a disposition is, of course, not binding on this Court once it has granted plenary review. *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975). The Eleventh Circuit did, however, seek respectfully to abide by the ruling in *Doe* as it understood it. And since the plaintiff in *Doe* contended only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life, *see* Jurisdictional Statement in *Doe*, No. 75-896 at 4, this Court's summary affirmance in that case could well have rested, as the Eleventh Circuit concluded, solely on the plaintiff's lack of standing. *See, e.g., Pressler* v. *Blumenthal*, 434 U.S. 1028, 1028-29 (1978) (Rehnquist, J., concurring) ("[summary] affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits . . . . Our 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits"); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J.,

issue here is the appropriate standard of review, not the validity of the statute.

SUMMARY OF ARGUMENT

The State of Georgia would extend its criminal law into the very bedrooms of its citizens, to break up even wholly consensual, noncommercial sexual relations between willing adults. And the State contends before this Court that it may freely do so without giving any good reason. All that Respondent argues is that a Georgia citizen is entitled by the Constitution to demand not only a warrant of the Georgia police officer who would enter his bedroom, but also a substantial justification of the Georgia legislature when it declares criminal the consensual intimacies he chooses to engage in there.

No less justification is acceptable in a society whose constitutional traditions have always placed the highest value upon the sanctity of the home against governmental intrusion or control. Nor is the mere invocation of contestable moral views sufficient to defend a law that so thoroughly invades individuals' most intimate affairs.

Thus the law challenged here must be subjected to heightened scrutiny, and it may be upheld upon remand *only* if the State of Georgia offers a far more powerful justification than the one it has offered here: namely, the tautology that the State has criminalized the private acts at issue because a majority of Georgia's legislators disapprove of them.

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concurring) (if plaintiffs lack standing, the Court should affirm the lower court's decision against plaintiffs "without passing upon it"); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (a summary disposition "affirms the judgment but not necessarily the reasoning by which it was reached").

ARGUMENT

In Section 16-6-2, the State of Georgia has criminalized certain sexual activities defined solely by the parts of the body they involve, no matter who engages in them, with whom, or where. Georgia threatens to punish these activities with imprisonment even if engaged in by two willing adults — whether married or unmarried, heterosexual or homosexual — who have secluded themselves behind closed bedroom doors in their own home, as Michael Hardwick did.[5] All that is at issue in this case is whether a state must have a substantial justification when it reaches that far into so private a realm.

The Eleventh Circuit held only that the Constitution indeed requires such heightened scrutiny for a law like the one challenged here. That court never reached the question whether the State might be able to meet such a standard, nor has the State yet had any opportunity in this case to try to do so. The Eleventh Circuit simply ruled that, because Section 16-6-2 criminalizes activity that is "quintessentially private and lies at the heart of an intimate association," the district court's dismissal of the complaint must be reversed, and the case remanded for a trial at which "the State must prove, in order to prevail, that it has a compelling interest in regulating this behavior and this statute is the most narrowly drawn means of safeguarding that interest." App. 26.

The State of Georgia urges this Court to overturn that ruling and declare that a law reaching into the bedroom to regulate

[5] Respondent Hardwick's standing to challenge Section 16-6-2 is indisputable. He is subject to prosecution even now for the private conduct that led to his arrest in his bedroom on August 3, 1982, because Georgia's four-year statute of limitations applies to his "crime." O.C.G.A. Section 17-3-1(c). And it was uncontested in the courts below that the State intends to continue to enforce Section 16-6-2 against such conduct, and that Hardwick intends to continue to violate the statute. *See* App. 9, 11; *id.* at 27 (Kravitch, J., concurring as to Hardwick's standing).

intimate sexual conduct is to be tested by no stricter a standard than a law that regulates the community environment outside the home: namely, a standard of minimal scrutiny. In the State's view, the most private intimacies may thus be treated as public displays, and the sanctum of home and bedroom merged into the stream of commerce — all subject to regulation whenever there is any conceivable "rational relationship" to the promotion of "traditional" or "prevailing" notions of "morality and decency."[6]

But our constitutional tradition does not permit such casual state control of our most private realm. Rather, this Court's precedents direct that the intrusion of Georgia's criminal law into the intimate, consensual activities proscribed by Section 16-6-2 be examined more carefully than the State would have it. The statute should be tested for a close relationship to a compelling state interest, as required by the court below. *See* App. 22, 26. But even if this Court should deem such scrutiny too strict, the statute should *at the very least* be tested for a "fair and substantial relation" to a legitimate governmental objective. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 400, 402 (1978) (Powell, J., concurring in judgment).[7] For the State has sought through that statute to control an area of life so removed from the public sphere that "the mere [invocation] . . . [of] the controversial realm of morals cannot [suffice as] justif[ication]." *See Poe* v. *Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

[6] Brief of Petitioner at 34-35.

[7] Whichever of these standards of review — the strict or the intermediate — is adopted here, the *judgment* of the court below must be affirmed, for it simply reversed the district court's flat dismissal of the complaint.

I. SECTION 16-6-2's SWEEPING CRIMINALIZATION OF INTIMATE SEXUAL CONDUCT IN THE PRIVACY OF THE HOME REQUIRES SPECIAL JUSTIFICATION.

This case involves a claim of constitutional protection for the associational intimacies of private life in the sanctuary of the home.[8] This Court has long held that special justification is required when a State would seek to invade *either* the zone of privacy *or* the boundaries of the home; this case involves *both*. This case is thus about the very core of that "most comprehensive of rights and the right most valued by civilized man," namely, "as against the Government, the right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The State of Georgia fully concedes, as it must, that this right is protected by the Constitution.[9] Georgia argues merely that the concerns Respondent invokes are not sufficiently "rooted in the traditions and moral values of our people" to be embraced by that constitutional right.[10] There the State is wrong, for those concerns are so rooted, and deeply so.

As the State would have it, this Court should forever freeze the right to be let alone by government within the precise facts of a few selected precedents — those which Georgia describes as involving "activities relating to marriage," "decisions relating to whether to conceive or bear a child," "child rearing and education," and nothing more.[11] The State thus wholly ignores

[8] No claim of special protection is made here for all activities that may be deemed "intimate," nor for all activities that may seek shelter inside the four walls of a private home. *See* section II *infra*.

[9] *See* Brief of Petitioner at 18 ("That there exists a right of personal privacy under the Constitution is not questioned by Petitioner"); *id.* at 39 ("Petitioner does not dispute this Court's power to define emerging rights under the Fourteenth Amendment or the Ninth Amendment").

[10] Brief of Petitioner at 39.

[11] Brief of Petitioner at 19; *see also id.* at 25.

this Court's long tradition of sensitivity to government intrusions into intimacy and the home, *independent* of its concerns for family integrity.[12] Moreover, the State wrongly supposes that it is the facts alone of prior cases that matter, and not their underlying principles. This Court, by contrast, has refused to cut off constitutional protection "at the first convenient, if arbitrary boundary" drawn by its prior cases, properly preferring to focus on "the *basic reasons why* certain rights . . . have been accorded shelter under the Fourteenth Amendment's Due Process Clause." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502, 501 (1977) (plurality opinion) (emphasis added). Accordingly, our tradition of liberty under the Due Process Clause has never "been reduced to any formula" nor "determined by reference to any code," *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting),[13] but rather has been "a living thing," *id.* at 542, that must grow and change over time within careful limits sketched by "solid recognition of the basic values that underlie our society," *Moore* v. *City of East Cleveland*, 431 U.S. at 503 (plurality opinion) (citing *Griswold* v. *Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).[14]

[12] *See* sections I.A and I.B *infra*.

[13] *See also Rochin* v. *California*, 342 U.S. 165, 169 (1952) (Frankfurter, J.) ("In dealing not with the machinery of government but with human rights, the absence of formal exactitude or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions"); *Nat'l Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("[g]reat concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience[,] [f]or . . . only a stagnant society remains unchanged"); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 684 (1977) (Brennan, J.) ("the outer limits of . . . privacy have not been marked by the Court").

[14] It is for just this reason that Justice Harlan, in *Poe*, wrote that the "general public opinion . . . of a bygone day" condemning contraceptives, 367 U.S. at 546-47 & n.12, could not justify the criminalization of their use. Likewise,

Respondent Hardwick seeks only such solid recognition of those basic values here. He invokes a tradition that is not static, but that evolves by "build[ing] on what has survived," *Poe* v. *Ullman*, 367 U.S. at 542 (Harlan, J., dissenting). Central to that tradition are values of intimate association, and of the sanctity of the home. Each of those values warrants independent constitutional protection. But their *intersection* in this case requires that government give especially substantial justification to the individual whose personal dwelling it would enter in order to control the consensual intimacies of his or her private adult life.

A. Ordered Liberty Requires That Intimate Relationships Between Consenting Adults Be Free From Unjustified State Intrusion.

The State of Georgia asserts that it may extend the arm of the criminal law into "the most intimate" of human relationships, *Roberts* v. *United States Jaycees*, 104 S.Ct. 3244, 3251 (1984), without having to offer any justification at all beyond the tautology that a majority of Georgia's legislators might disapprove of the acts outlawed. This Court has long recognized, however, that "because the Bill of Rights is designed to secure individual liberty, it must afford . . . certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 3250. So long as the sexual acts proscribed by Section 16-6-2

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the general public opinion of an earlier day that led Justice Harlan to take for granted the condemnation of homosexual practices, *see id.* at 546, 547, 552, 553, cannot justify criminalization of those practices today. In the quarter-century that has passed since Justice Harlan wrote, more than half the states in the Union have decriminalized private homosexual acts between consenting adults, *see* nn. 23, 49 *infra*, and our nation's professional societies have taken the position that such acts should not be condemned either by medicine or by law, *see* n. 51 *infra*.

take place in private and involve no children, commerce, or coercion,[15] they must be regarded as within the realm of just such relationships.

That sexual intimacy, even between unmarried persons and for purposes other than procreation, occupies this protected realm is evident from this Court's repeated vindication of the right to privacy in the context of contraception. Each time this Court has reviewed a criminal law that heavily burdened the decision to use contraceptive devices during sex, it has held that such a law must be subjected to heightened scrutiny — either for a close relationship to a compelling state interest, *see Carey* v. *Population Services Int'l*, 431 U.S. at 686, or at the very least for a fair and substantial relation to a legitimate state objective, *see Eisenstadt* v. *Baird*, 405 U.S. 438, 447-50 (1972). *See also Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965). As the State of Georgia would read them, these rulings protect not an intimate human relationship but only a narrow demographic decision: whether or not to increase the size of one's family.[16] But to read those decisions so narrowly is to ignore the basic values they protect.

To be sure, it is well established that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. at 453. There can thus be no doubt that our fundamental liberty entitles us to demand strong reason

[15] None of these proper objects of state concern are remotely involved here. *See* section II *infra*.

[16] *See* Brief of Petitioner at 19, 25.

when government would bar us from procreating,[17] or compel us to reproduce.[18]

But the right to control one's family size cannot by itself explain the protection this Court gave to the activities involved in the contraception cases. After all, *that* right can be vindicated, without any recourse to contraceptives, by simply refraining from sexual intercourse. No law of Connecticut, Massachusetts, or New York prohibited celibacy or abstinence as methods of avoiding childbirth. Rather, those states' laws were challenged and struck down because, by barring access to contraceptives, they imposed the onerous risks of disease and unwanted pregnancy on the very sexual relations that people otherwise wished to enjoy.[19]

This Court's privacy decisions thus do *not*, as petitioner would have it, concern only "marriage, the family, . . . and decisions as to whether through procreation the ancient cycles will begin again . . .."[20] Neither the right of access to contraceptive technology affirmed in *Eisenstadt* and *Carey*, nor the right to abortion services upheld in *Roe* v. *Wade*, 410 U.S. 113 (1973), was limited to married couples. Indeed, in *Eisenstadt* the Court declared that just such a distinction between married and single persons was unconstitutional. And the plaintiff in *Roe* was unmarried. These decisions thus did not revolve around "marriage" or "the family."

[17] *See, e.g., Griswold* v. *Connecticut*, 381 U.S. at 496-97 (Goldberg, J., concurring) ("Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. . . . [S]uch totalitarian limitation of family size . . . is at complete variance with our constitutional concepts"); *see also Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

[18] *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 152-53 (1973).

[19] *See, e.g., Eisenstadt* v. *Baird*, 405 U.S. at 448; *Carey* v. *Population Services Int'l*, 431 U.S. at 694-95 (plurality opinion); *id.* at 714-15 (Stevens, J., concurring in part and concurring in the judgment).

[20] Brief of Petitioner at 25.

Nor did they revolve around the "ancient cycles" of procreation. As this Court stressed in *Carey*, the constitutional principle of "individual autonomy" affirmed in *Griswold*, *Eisenstadt* and *Roe* protected not procreation, but the individual's "right of *decision*" about procreation, 431 U.S. at 687-89 (emphasis in original), and in each case this Court protected the decision to engage in sex *without* bearing or begetting a child. These holdings mandated heightened scrutiny not of state restrictions on procreative sex, but rather of restrictions on *non*-procreative sex — sex solely as a facet of associational intimacy — whether between married partners or between unmarried individuals.

The State of Georgia has failed to grasp that this Court's decisions upholding access to contraceptives involved not so much the right to buy and use a particular pharmaceutical product, as the right to engage in sexual intimacy as such. Put another way, decision-making about contraceptive use occupies a zone of presumptive protection from the state not just because it touches upon child-bearing, but also because it arises solely in the context of "a field that by definition concerns the most intimate of human activities and relationships" — namely, *sexual* activities and relationships. *Carey* v. *Population Services Int'l*, 431 U.S. at 685. And those activities and relationships do not lose that intimate status when engaged in for reasons other than procreation.

Nor should it be surprising that the state must provide substantial justification for interference in this zone. For it is one of the hallmarks of difference between our free society and a totalitarian one that our government cannot lightly trespass in the intimacies of our sexual lives — whether or not our conduct of those intimacies at any given moment involves a choice about conceiving a child. It would surely trigger strict judicial scrutiny, for example, if a state were to ban sexual relations between infertile couples, or by women past the age of meno-

pause, even though such a ban could have no impact at all on these individuals' decisions whether to bear or beget a child. In a free society it is not the business of government to intervene between two consenting adult sexual partners to dictate means or ends for their intimacy — *unless* the state can offer a special, particularized explanation for doing so.

The State of Georgia tacitly concedes this much with respect to intimate contacts between men and women in violation of the terms of Section 16-6-2, for the State throughout its brief attacks only the extension of the right of privacy to "*homosexual* sodomy."[21] For this reason alone, the ruling of the Eleventh Circuit should be affirmed, because Georgia has never explained why it need offer no justification for banning *heterosexual* sodomy, even though Section 16-6-2 proscribes specified physical contacts without regard to the gender of the individuals involved.

But particularized justification of the statute is also required insofar as the statute applies to intimate sexual contacts between persons of the *same* sex. For neither marriage nor procreative purpose is a prerequisite to demanding special justification when the criminal law would intrude into one's private physical relationships, as this Court's protection of unmarried heterosexuals using contraceptives makes clear. Nor can consensual homosexual contact in private any longer be deemed so transparently evil that a government need not explain its criminalization to any judicial authority. Surely no activity may be deemed self-evidently injurious in a nation where, as the State concedes,[22] more than half the states have decriminalized it.[23] *See, e.g., Loving* v. *Virginia*, 388 U.S. 1, 6 & n.5

[21] *See, e.g.*, Brief of Petitioner at 20, 21, 23, 24, 25, 26, 27, 29, 34, 36, 37, 38 (emphasis added).

[22] Brief for Petitioner at 23 & n.13.

[23] The vast majority of the American population lives in the 26 states that have decriminalized private, consensual, adult homosexual acts, either by legislative (Alaska, California, Colorado, Connecticut, Delaware, Hawaii,

(1967) (interracial marriage cannot be deemed immoral *per se* after being decriminalized by most states that once had banned it). Rather, the State that would criminalize such conduct has a burden of explanation: it must advance particular objects to which the law is well tailored, as the Eleventh Circuit required in the decision below.

B. Ordered Liberty Requires That The Private Home Be A Zone Free From Unjustified State Intrusion.

The State of Georgia contends that it may extend its criminal authority deep inside the private home without even offering any special justification. In so doing, the State ignores the fundamental principle, restated by the Chief Justice for the Court in *United States* v. *Orito*, 413 U.S. 139, 142 (1973), that "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education."

In this case, as in *Payton* v. *New York*, 445 U.S. 573, 601

Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming) or judicial means (New York, Pennsylvania and Massachusetts). Petitioner claims that 25 states still outlaw oral and anal sexual contacts, Brief for Petitioner at 23 & n.13, but its list of such jurisdictions erroneously includes the Commonwealth of Massachusetts, which has long since held its sodomy law unconstitutional as applied to the acts of consenting adults in private, *see Commonwealth* v. *Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974).

Nor can the remaining division among the states on this issue be viewed simply as a benign patchwork of legislative experiments. For a state's prerogative to "serve as a laboratory, and try novel social and economic experiments," *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), in its public sphere entails no comparable prerogative to conduct "'experiments at the expense of the dignity and personality' of the individual," *Poe* v. *Ullman*, 367 U.S. at 555 (Harlan, J., dissenting) (quoting *Skinner* v. *Oklahoma*, 316 U.S. at 546 (Jackson, J., concurring)). *See* section II *infra*.

(1980), "neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." These traditions, given concrete form in the Fourth and Fourteenth Amendments, have "drawn a firm line at the entrance to the house." *Id.* at 590. When we retreat inside that line, the government must provide escalating justification if it wishes to follow, monitor, or control us there.

The Court has recognized this special protection in a variety of circumstances. Thus, the government must obtain a warrant to arrest a person at home — even if it would not need a warrant for an arrest on the street. *Id.* This is so notwithstanding "'historical acceptance' of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States." *Id.* at 581.[24] For, as Justice Stevens wrote for the Court in *Payton*, "[i]n no [setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'" *Id.* at 589.

More than the procedural protections of the Fourth Amendment are heightened when one goes home and shuts the door. Property rights in themselves "reflect society's explicit recognition of a person's authority to act as he wishes in certain areas." *Rakas* v. *Illinois*, 439 U.S. 128, 153 (1978) (Powell, J., concurring). The home not only protects us from government surveillance, but also "provide[s] the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference," *Oliver* v. *United*

[24] Even the "pure[st]" of "common law pedigree[s]" cannot ensure the continuing constitutional validity of long-practiced invasions of body or home. *Tennessee* v. *Garner*, 105 S.Ct. 1694, 1703 (1985). Thus the State of Georgia's lengthy recitation of instances where homosexuality has been disapproved in western history, Brief of Petitioner at 19-23, is beside the point.

States, 466 U.S. 170, 179 (1984).[25] This Court has thus held that, however free the state may be to ban the *public* dissemination of constitutionally unprotected obscene materials, the state cannot criminalize the purely *private* possession of such materials at home. *Stanley* v. *Georgia*, 394 U.S. 557, 559 (1969). For rights protected by other provisions of the Constitution "take[ ] on an added dimension" in the privacy of the home, given the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564. Thus, even though the First Amendment did not protect the material involved as such, this Court in *Stanley* observed that, "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

It would be ironic indeed if government were constitutionally barred, whatever its justification, from entering a man's home to stop him from obtaining sexual gratification by viewing an obscene film — but were free, without any burden of special justification, to enter the same dwelling to interrupt his sexual acts with a willing adult partner. The home surely protects more than our fantasies alone.

C. When Relationships Are Both Intimate In Kind *And* Insulated In The Home, There Is Double Reason To Demand Justification From Any Government That Would Root Them Out There.

In elaborating our right to privacy, this Court has long made clear that special sensitivity is required where, as here, govern-

[25] *See generally* Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968) (physical privacy is as necessary to "relations of the most fundamental sort: respect, love, friendship and trust," as "oxygen is for combustion").

ment would intrude into the realm where the intimacy of human relationships and the privacy of the home intersect.[26] As Dean John Hart Ely explained over a decade ago, this Court's invalidation in *Griswold* of a statute regulating the use of contraceptives indicated an underlying concern that enforcement of the statute "would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home."[27] Put another way by Justice Douglas, writing for this Court, Connecticut's contraceptive ban forced the question, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Griswold* v. *Connecticut*, 381 U.S. at 485. He had no hesitation in answering that such searches would be "repulsive." *Id.* at 486.[28]

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[26] In the words of two noted commentators, intimate sex between consenting adults in the privacy of the bedroom implicates two intertwined strands of the privacy right: an "autonomy right" and a "seclusion right." *See* Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977). While these authors disagree on whether a government might succeed upon review in justifying invasion of these combined rights through anti-sodomy laws, *see id.* at 596, they agree fully that invasion of these rights requires careful review for a justification "of some power," *id.* at 593.

[27] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929-30 (1973).

[28] To extend this analogy in the context of the Georgia statute at issue here would raise the even more "repulsive" prospect of searches not just of the bedroom, but of the body cavities themselves for "telltale signs" of oral or anal sexual contact. There can be no hesitation in concluding that such searches would violate "expectations of privacy and security of such magnitude that the intrusion [would] be 'unreasonable.'" *Winston* v. *Lee*, 105 S.Ct. 1611, 1616 (1985) (holding unreasonable under the Fourth Amendment a compelled surgical removal of a bullet from a suspect's chest). *See generally Rochin* v. *California*, 342 U.S. 165 (1952) (compelled stomach-pumping repugnant to fundamental notions of fairness). *Cf. Bell* v. *Wolfish*, 441 U.S. 520, 563 (1979) (Powell, J., dissenting in part) (even prison inmates, whose reasonable expectation of privacy is slight, are entitled to some meaningful state justification when they are subjected to the "serious intrusion on one's privacy occasioned by . . . anal and genital [body-cavity] searches").

This concern is more than a procedural one. Long before imposing upon the states a constitutional requirement that illegally seized evidence be suppressed, for example, no Member of this Court expressed any doubt that assertions of government power over the intimacy of the bedroom must trigger heightened judicial solicitude in the enforcement of the Due Process Clause. In *Irvine* v. *California*, 347 U.S. 128 (1954), although the Court was divided over whether the outrage of bedroom surveillance required reversal of a gambling conviction, no Justice disagreed with the dissenting observation of Justice Frankfurter that the action of police in planting a microphone in the Irvines' bedroom entailed "a more powerful and offensive control over the Irvines' life than a single, limited physical trespass could have entailed." *Id.* at 145. As Justice Douglas likewise observed, such an invasion of the bedroom "smack[s] of the police state, not the free America the Bill of Rights envisaged." *Id.* at 149 (Douglas, J., dissenting).

Nor would concern about government intrusion into the bedroom evaporate if Georgia's police were to obtain evidence of the acts listed in Section 16-6-2 by subtler means today.[29] For "[i]t would surely be an extreme instance of sacrificing substance to form were it to be held that the constitutional principle of privacy against arbitrary official intrusion comprehends only *physical* invasions by the police." *Poe* v. *Ullman*, 367 U.S. at 551 (Harlan, J., dissenting) (emphasis added). The substantive protection of the privacy of the home is what gives the express procedural guarantees of the Fourth Amendment their meaning. *See id.* at 549-51.[30] If judicial

[29] Respondent Hardwick, watched and seized in his own bedroom, was hardly the beneficiary of any such subtler means. *Cf. Payton* v. *New York*, 445 U.S. at 617 (White, J., dissenting) (police procedures must at a minimum "protect individuals against the fear, humiliation and embarrassment of being roused from their beds in states of partial or complete undress").

[30] As Justice Harlan wrote in dissent in *Poe* v. *Ullman*, "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect

application of the Bill of Rights is not to be reduced to an "arid ritual of meaningless form," *Staub* v. *Baxley*, 355 U.S. 313, 320 (1958), a Georgia citizen must be entitled to demand not only a warrant of the Georgia police officer who enters his bedroom, but also a justification of the Georgia legislature when it declares criminal the consensual intimacies he chooses to engage in there.

II. CLOSE SCRUTINY OF A LAW THAT CRIMINALIZES THE MOST PRIVATE OF RELATIONSHIPS WILL IN NO WAY ENDANGER LAWS THAT REGULATE THE PUBLIC SPHERE.

The State of Georgia labors long in its brief to establish a proposition Respondent has never denied: namely, that the protection of the *public* realm is a legitimate interest that may be advanced by state law.[11] This proposition, however, is wholly incapable of supporting Section 16-6-2. For that law bans all sexual contacts of a specified kind — even if conducted out of public view behind closed bedroom doors, even if engaged in by marriage partners or other fully consenting adults, and even if engaged in for love and not money. It thus intrudes the grasp of the criminal law deep into an area that implicates no state interest in protecting public sensibilities, nor in protecting vulnerable persons such as minors from possible coercion, nor in restricting commercial trade in activities offensive to public decency. All that Respondent argues is that the authority

the privacies of the life within." 367 U.S. at 551. By contrast, areas lying beyond the curtilage lack constitutional protection from government incursion because they "are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment." *Oliver* v. *United States*, 466 U.S. at 179 n.10.

[11] *See* Brief of Petitioner at 34-39.

of government, undisputed here, to so regulate the *public* sphere does not extend with full force into every private bedroom in the land.

The decisions of this Court — including those petitioner would invoke — make clear that the traditional police power of government is limited in the private sphere in ways that it is not in the public. As the Chief Justice observed in *United States* v. *Orito*, 413 U.S. at 142, "It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public."[12] It may thus make all the difference *where* the state seeks to regulate such personal conduct — including sexual activities. As the Chief Justice wrote for the Court in *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 67 (1973), for example, a married couple's right to engage in unfettered sexual relations in their bedroom affords no protection to a sexual embrace at high noon in Times Square. *See also id.* at 66 n.13. Conversely, the state's power to ban the showing of obscene films to consenting adults in a theater open to anyone with the price of a ticket, *see id.*, entails no comparable power to criminalize the possession and enjoyment of the very same obscene material in the privacy of the home, *see Stanley* v. *Georgia*, 394 U.S. at 559, 565. And government power to zone live "adult" entertainment restrictively, *see Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 71-72, 76 (1981), or to dictate that nude dancing shall not accompany the serving of alcohol in restaurants or public houses, *see California* v. *LaRue*, 409 U.S. 109 (1972), hardly implies

[12] The Chief Justice explained in *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 65 (1973), that "[t]his privacy right encompasses and protects the personal intimacies of the home . . . [citing] *Stanley* v. *Georgia* . . .." *See id.* at 66 n.13 ("The protection afforded by *Stanley* v. *Georgia* is restricted to a place, the home").

similar authority to tell citizens how to dress when entertaining guests or serving drinks in their own homes.

Nor should it be surprising that, in the kind of society contemplated by our Constitution, government must offer greater justification to police the bedroom than it must to police the streets. For the zoning power confers only the most limited governmental authority over decisions governing lifestyle within the home. *See, e.g., Moore* v. *City of East Cleveland*, 431 U.S. at 518-19 (Stevens, J., concurring in judgment).[33] Even in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), in upholding a zoning law that excluded all but families from residence in a municipality, this Court stressed that the law stopped short of prohibiting unmarried couples from living together, *see id.* at 8, and in no way regulated who could be entertained by householders, or how, within their homes, *see id.* at 9. In short, contrary to the State of Georgia's contentions, this Court has never held that the public environment pervades every private bedroom nor encompasses every intimacy. The latter occupy a specially protected domain.

Heightened scrutiny of Section 16-6-2 will thus in no way entail any closer review of laws regulating the community environment. Indeed, even if Section 16-6-2 were to be invalidated on remand, the State of Georgia would retain on its books criminal laws banning public indecency,[34] prostitution,[35] pimping,[36] and pandering.[37] Because these activities, unlike the

[33] *See also* R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 109 n.4 (1985) ("the notion of private property is designed to exclude [moral] judgments about the conduct of others," particularly judgments by moral consensus that certain "activities . . . are unworthy in themselves even if they cause no harm to others").

[34] O.C.G.A. Section 16-6-8.

[35] *Id.* Section 16-6-9.

[36] *Id.* Section 16-6-11.

[37] *Id.* Section 16-6-12.

private activities for which Respondent seeks protection, involve society's public spaces and commercial exchanges, nothing in an affirmance here would remotely require of these laws any more than a rational relationship to public decency.[38]

Nor of course does affirmance here entail any heightened scrutiny of criminal statutes protecting unconsenting citizens — including children — from sexual force or coercion. Should Section 16-6-2 be struck down on remand, Georgia would remain fully equipped to prosecute rape,[39] forcible sodomy,[40] statutory rape,[41] and child molestation.[42] These statutes are transparently related to the state's fundamental duty to shield

[38] The State of Georgia's innuendo that this case has some bearing on the regulation of sex in "public parks, restrooms, 'gay baths,' and 'gay bars,'" *see* Brief of Petitioner at 36-37, is thus incomprehensible. Even if the State's imaginative recasting of the 30 million Americans who comprise our homosexual population as a furtive criminal underclass, *see id.*, had the slightest basis in fact, rather than in irrational fear and prejudice, *cf. City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3259, 3260 (1985); *id.* at 3262 (Stevens, J., concurring), the State appears to have missed the point that nothing in Respondent's argument claims any special protection for sexual activity — homosexual or heterosexual — in our society's public squares or commercial establishments.

[39] O.C.G.A. Section 16-6-1.

[40] *Id.* Section 16-6-2(a) ("aggravated sodomy"). The State of Georgia mistakenly reads this Court to have "indicat[ed] in *Rose* v. *Locke*, 423 U.S. 48, 50 n.3 (1975), that the act of cunnilingus is not considered to involve a fundamental right." Brief of Petitioner at 24; *see also id.* at 15. What the Court said, however, is simply that no fundamental right is implicated in a case where that sexual act is imposed by force at the point of a "butcher knife." *Id.* at 48. Respondent could hardly agree more with that holding. But the *forcible* sodomy provision of Section 16-6-2 is more than adequate to support prosecution of such brutal conduct, even if the part of that statute challenged here were struck down.

[41] *Id.* Section 16-6-3.

[42] *Id.* Section 16-6-4.

us from harms wrought by others — a concern wholly absent in the case of consensual adult sexual conduct.[43]

Likewise, affirmance here does not entail any closer scrutiny of criminal laws against adultery or polygamy. For unlike Section 16-6-2 — which defines a "crime" in terms of the anatomical parts involved, not in terms of any relationships violated — these laws protect the estate of monogamous marriage. Marriage, unlike other manifestations of intimate association, is a contract controlled by the state, and, like "any other institution," it is "subject to the control of the legislature." *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888).[44] Thus close scrutiny of state intrusion upon private, consensual, noncommercial sexual acts, such as the intrusion which Hardwick challenges, does not suggest similar scrutiny of laws that would restrain those who have entered marriage contracts from violating those agreements.[45]

In short, the State of Georgia's suggestion that affirmance in this case will somehow confer colorable privacy claims on those who would defend their right to engage, against their states' criminal laws, in "such acts as prostitution, suicide,

[43] Nor does this case implicate in any way state laws enacted to protect us from self-inflicted harms — by requiring us to wear seatbelts, by forbidding us to use dangerous drugs, or otherwise. Respondent obviously does not contend that the Fourteenth Amendment enacted John Stuart Mill's ON LIBERTY, any more than it enacted Herbert Spencer's SOCIAL STATICS. *See Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[44] Respondent Hardwick, of course, claims no right whatever to have any homosexual relationship recognized as a marriage. But the power of the state to place conditions on a marriage that individuals choose to enter into and maintain in no way entitles the state to impose even a financial barrier, much less a criminal sanction, on an individual's right *not* to be married if he or she so chooses. *Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971).

[45] Section 16-6-2 is obviously not limited to adulterous or polygamous sodomy; rather, it sweepingly criminalizes acts even between marriage partners or between two unmarried people.

voluntary self-mutilation, and bigamy"[46] is without the slightest foundation. Affirmance in this case would provide no basis to require close scrutiny of such laws, much less to undermine the legitimacy of their purposes.

Finally, affirmance here will in no way compel close scrutiny of any *non*criminal laws that might favor certain sexual unions over others. For as Justice Harlan wrote in *Poe* v. *Ullman*, the standard of judicial scrutiny when the state seeks to codify public morality may vary with the state's "*choice of means*." 367 U.S. at 547 (emphasis in original). Thus the state may seek to discourage the use of contraceptives by granting tax subsidies and be subject only to minimal scrutiny, but it may not, without more compelling justification, wield the bludgeon of criminal sanctions against such conduct. *Id.* at 548. Likewise, the state may, without having to answer to a court, "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds," *Maher* v. *Roe*, 432 U.S. 464, 474 (1977), but it may not, without powerful reason, criminalize abortion, *Roe* v. *Wade*. There is thus no cause for worry that affirmance of the decision below — which mandates heightened scrutiny only of a *criminal* law that would police the most intimate of relations in the most private of enclaves — would cast doubt on any administrative programs that states might fashion to encourage traditional heterosexual unions.

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[46] Brief for Petitioner at 28; *see also id.* at 32-33.

III. THE STATE HAS ADVANCED NO LEGITIMATE GOAL TO WHICH SECTION 16-6-2 BEARS EVEN A FAIR OR SUBSTANTIAL RELATION, MUCH LESS A CLOSE FIT.

The State of Georgia has put forward one reason and one reason only why it believes Section 16-6-2 valid: namely, the tautology that, inasmuch as homosexual sodomy offends "traditional moral values,"[47] the State has "declared [such conduct] to be morally wrong."[48] Even if the vindication of morality *per se* were the sort of reason that could properly justify banning consensual adult sex in the privacy of the home, there is no moral consensus against the conduct proscribed by Section 16-6-2. Indeed, such conduct has been systematically decriminalized by half the States in the thirty years since the authors of the Model Penal Code first urged that result.[49] Surely the sincerity of the State's claim that Section 16-6-2 implements universal morality is thrown into grave doubt by the fact that state after state has found it possible to preserve traditional norms without intruding its criminal law into the no less traditional inner sanctum of the private bedroom.[50] Moreover,

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[47] Brief of Petitioner at 36; *see id.* at 38.

[48] *Id.* at 27.

[49] MODEL PENAL CODE Section 213.2; Article 207.1, Comment. The American Law Institute first proposed decriminalization in 1955. Two states repealed their "sodomy" laws in the 1960s, 20 more followed suit in the 1970s, and one more has done so in this decade. *See* Rivera, *Book Review of Sexual Politics, Sexual Communities*, 32 U.PA.L.REV. 391, 410 (1984); see n. 23 *supra*. In three additional states, sodomy laws have been held unconstitutional as applied to private, consensual, noncommercial sexual acts. *See* Rivera, *supra* at 410.

[50] *Cf. City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. at 3258-60; *Zobel* v. *Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534-35 (1973).

the nation's major scientific and professional associations,[51] as well as a host of religious organizations,[52] have officially declared their opposition to state regulation of private adult sexual conduct by force of criminal sanction.

To be sure, vindicating the supposed morality of the majority might be a sufficient justification if Georgia were here banning prostitution on its streets or zoning obscene movie theaters away from its downtowns. As this Court stressed in *Paris Adult Theater*, no requirement of empirical justification need be offered when a state or city seeks to pursue a particular moral or even aesthetic vision in designing and policing its local public environment. 413 U.S. at 62-63. But Section 16-6-2 is in no way directed at such regulation of public life. Because Section 16-6-2 is instead directed at intimate relations however private, and thus slices deeply into the sanctity of the home, this law cannot be defended, as a zoning statute might be, by "the mere assertion that the action of the State finds justification in the controversial realm of morals." *Poe* v. *Ullman*, 367 U.S. at 545 (Harlan J., dissenting).

Rather, this law can be defended only if it can be shown to serve closely some state objective *other than* the bald assertion

[51] Resolution of the Council of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975); Resolution of the American Bar Association House of Delegates, Summary of Action at 23 (August 1975); Resolution adopted in lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report at 84 (1975); Policy Statement of the Delegate Assembly of the National Association of Social Workers (1977).

[52] These groups include the National Council of Churches, the Union of American Hebrew Congregations, the National Federation of Roman Catholic Priests' Councils, the Lutheran Church of America, the United Church of Christ, the Methodist General Conference, the United Presbyterian Church, the Episcopal Church, the American Baptists, and the Society of Friends. Hiltner, *Homosexuality And The Churches*, in HOMOSEXUALITY: A MODERN REAPPRAISAL (1980); PRESBYTERIAN BLUE BOOK I & II: REPORT ON THE CHURCH AND HOMOSEXUALITY (1978).

of one possible moral view.[53] Accordingly, the judgment below must be affirmed, for it simply instructed the district court to test the law under a standard sufficiently searching to expose the empirical or other premises the State may claim underlie it. Whether the State can justify its law under such scrutiny need not be decided here, but should be resolved first by the courts below.

Only then may the untried questions of fact to which Georgia alludes in its brief become relevant. For example, the State's allusions to the transmission of disease through anal or oral sexual contact[54] are wholly inapposite here, where the only issue is the relevant standard of review, *not* the validity of Section 16-6-2. Conceivably, such considerations might be introduced on remand, if scientifically supportable,[55] as a possible *post hoc* rationalization for a law Georgia has until now sought to defend solely as the morals measure it was when first enacted. If so, it would then be incumbent on the State to explain how a threat of criminal prosecution could serve as an effective public health measure, rather than driving underground the very information that medical authorities need most, by fostering fear that a visit to a doctor will mean prison for the patient.[56]

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[53] *Cf. Roe* v. *Wade*, 410 U.S. 113, 162 (1973) ("we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake").

[54] *See* Brief of Petitioner at 37.

[55] The scientific controversy over AIDS would make it wholly inappropriate, as well as premature, for this Court to take judicial notice of such matters.

[56] *See, e.g., Baker* v. *Wade*, 106 F.R.D. 526, 530, 531 (N.D. Texas 1985) ("'to criminalize homosexuality is possibly the worst conceivable way to try and solve the problem of AIDS' because this simply serves 'to drive the whole issue underground, so that surveillance and early diagnosis will be made that much more difficult, if not impossible'"; criminalizing homosexual conduct in order to combat AIDS "'would be a public health disaster'"); *New Jersey* v.

Likewise, should the State seek to support the law as necessary to deter its citizens from defecting to a homosexual lifestyle,[57] it will have to meet a double burden of showing first, how a statute indiscriminately banning both homosexual *and* heterosexual sodomy could possibly be related to such a goal, and second, why such a deterrent is necessary if traditional moral values affirmed by the people of Georgia oppose homosexuality, as the State has asserted before this Court.[58] Finally, if little such deterrent effect could be demonstrated, for example because homosexuality is an immutable characteristic,[59] the State would be hard pressed to defend the law. For symbolism alone is surely an insufficient basis. *Cf. Carey* v. *Population Services Int'l*, 431 U.S. at 715 (Stevens, J., concurring). And if the law were a vehicle only for sporadic and discretionary enforcement, serious questions of due process and equal protection would be raised.[60]

All of these however, remain questions appropriate not here but on remand, as the Eleventh Circuit rightly held. That court

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Saunders, 75 N.J. 200, 381 A.2d 333, 341-42 (1977) ("[The fornication statute] is counterproductive. To the extent that any successful program to combat venereal disease must depend upon affected persons coming forward for treatment, the present statute operates as a deterrent").

[57] *See, e.g.*, Brief of Petitioner at 37 (alluding to supposed appeal of homosexuality to adolescents).

[58] In a democracy such as ours, delicate issues of private morality are perhaps best nurtured by our families and churches, rather than by the state. *See Poe* v. *Ullman*, 367 U.S. at 521-22 (Douglas, J., dissenting) (noting that in democratic states, unlike totalitarian ones, subcommunities such as family and church flourish independent of state control).

[59] When the American Psychiatric Association removed homosexuality from its list of "diseases" in 1973, it had concluded after long study that homosexual orientation was not something "treatment" could change. *See* Resolution of the American Psychiatric Association (December 15, 1973).

[60] *See, e.g., Kolender* v. *Lawson*, 461 U.S. 352 (1983); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

simply recognized "what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." *Poe* v. *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting). That government must submit to such scrutiny when it would reach deeply into our homes and private lives is simply a feature of our system of ordered liberty.

CONCLUSION

For these reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I. RESPONDENT MISCONCEIVES THE TEST FOR DETERMINING APPLICATION OF THE RIGHT OF PRIVACY

We deal here with the right of privacy first announced by the Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965). It is upon *Griswold* and its progeny that the Eleventh Circuit relied in reaching its decision that the Georgia sodomy statute "infringes upon the fundamental constitutional rights of Michael Hardwick." *Hardwick v. Bowers,* 760 F.2d 1202, 1211-12 (11th Cir. 1985) (Cert. Appendix at 22-24).

Only fundamental rights, implicit in the concept of ordered liberty, are protected by this right of privacy. In *Roe v. Wade,* 410 U.S. 113 (1973), the Court said that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152, *quoting Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

As Petitioner has previously argued, in order to decide whether a right is fundamental and implicit in the concept of ordered liberty the history and traditions of our society and its institutions must be examined. In *Duncan v. Louisiana,* 391 U.S. 145 (1968), the Court made it clear that due process analysis requires an examination of *our* history and that inquiry into other systems of ordered liberty or theoretical speculation about what might be fundamental in some abstract system of ordered liberty is not to the point. In *Duncan,* the Court was confronted with the issue of whether the right to trial by

jury in criminal cases should be applied to the states through the Due Process Clause of the Fourteenth Amendment. In deciding whether a particular procedural safeguard is required by due process, the Court said that the question is not whether "a civilized system could be imagined that would not accord the particular protection." *Id.* at 149 n.14. Rather, the Court described the question as whether under *our* system a particular procedure is fundamental: "The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* In many privacy decisions, including *Griswold* itself, the Court has emphasized its obedience to history in deciding whether activities and decisions are protected from government regulation under the right of privacy. *Griswold,* 381 U.S. at 480; *id.* at 493 (Goldberg, J., concurring); *Roe v. Wade,* 410 U.S. at 129, 140, 157-158, 165; *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 502-03 (1977) (plurality opinion) (following "an approach grounded in history"); *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972).

In his brief, Respondent rejects the historical approach to identifying fundamental rights. Respondent acknowledges, as an abstract proposition, that development of the right of privacy must occur "within careful limits sketched by 'solid recognition of the basic values that underlie our society.'" Brief of Respondent at 8 (cit. omit-

ted). Respondent goes on to say that he "seeks only such solid recognition of those basic values here." *Id.* at 9. Respondent also indicates that his arguments depend on the concept of ordered liberty.[1] At the close of his brief, Respondent urges that his conclusions are "a feature of our system of ordered liberty." Brief of Respondent at 29. Despite these allusions, he steers a wide detour around the subject of history. He completely ignores the subject except to say at one point: "Thus, the State of Georgia's lengthy recitation of instances where homosexuality has been disapproved in western history . . . is beside the point." Brief of Respondent at 15 n.24. In contrast with the reliance placed upon history by this Court in its previous due process and privacy decisions, Respondent takes the position that "history . . . is beside the point."

Respondent claims support for his non-historical approach from two decisions: namely, *Payton v. New York*, 445 U.S. 573 (1980), and *Tennessee v. Garner*, — U.S. —, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Both *Payton* and *Garner* are Fourth Amendment cases in which the history of that Amendment was discussed. In *Payton*, the Court was faced with the issue of whether the Fourth Amendment permits a police officer "to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." 445 U.S. at 574. In *Payton*, the Court expressed great deference to history in deciding what is

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[1]Respondent states in his sub-headings that ordered liberty requires that intimate relationships between consenting adults and activities occurring in the private home be insulated from government regulation. Brief of Respondent at 9, 14.

reasonable under the Fourth Amendment. After discussing the conflicting views at common law on the permissibility of warrantless entries into the home in the absence of exigent circumstances, the Court concluded as follows: "[T]he issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted." *Id.* at 598. In support of his position that "history . . . is beside the point" in the present case, Respondent quotes from the following passage from *Payton:*

> In this case, however, neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the republic.

Id. at 601. It is obvious that this statement does not support Respondent's position here. The Court in *Payton* was simply stating its conclusion that, with respect to the issue presented in that case, history was inconclusive and therefore not controlling. In addition, it is also obvious that there is a world of difference in interpreting the Fourth Amendment, with the expressed flexibility of a reasonableness standard, and deciding the substantive reach of the Due Process Clause in cases not involving searches or seizures.

Respondent quotes another passage from *Payton* in support of his position that "history . . . is beside the point." Respondent adduces this quotation in support particularly of his argument that ordered liberty requires that the private home be free from state regulation. Respondent's full statement is as follows:

> The Court has recognized this special protection in a variety of circumstances. Thus, the government

> must obtain a warrant to arrest a person at home—even if it would not need a warrant for an arrest on the street. *Id.* This is so notwithstanding " *'historical acceptance' of warrantless entries to make felony arrests, both in the English common law and in the practice of many American states.*" *Id.* at 581. For, as Justice Stevens wrote for the Court in *Payton*, "[i]n no [setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that defines its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' " *Id.* at 589.

Brief of Respondent at 15 (emphasis added). In the emphasized language, Respondent leaves out the word "apparent." In summarizing the history of the case in the lower courts, this Court in *Payton* said the following: "The majority [of the New York Court of Appeals] supported its holding [that warrantless entries are permissible] by noting the '*apparent* historical acceptance' of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States." *Payton*, 445 U.S. at 581 (emphasis added). But as we have just seen, the Court in *Payton* concluded that there was no consensus at common law regarding the propriety of such entries. Therefore, Respondent has distorted the Court's statement in an effort to support his contention that "history . . . is beside the point."

Respondent also quotes from *Tennessee v. Garner*, — U.S. —, 105 S.Ct. 1694. Brief of Respondent at 15 n.24. In *Garner*, the Court held that despite the common law rule that all necessary force could be used to effect the arrest of a fleeing felon, "[t]he use of deadly force to prevent the

escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable'' under the Fourth Amendment. 85 L. Ed. 2d at 9. The Court held that historical changes in the scope of capital punishment, the arming of law enforcement officers, and the development of weapons made the common law rule unreasonable under the Fourth Amendment. The Court said: ''In short, though the common law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.'' 85 L.Ed.2d at 12. In support of his position that ''history . . . is beside the point'' in deciding the scope of the right of privacy, Respondent borrows from this statement in *Garner*. Respondent says: ''Even the 'pure[st]' of 'common law pedigree[s]' cannot ensure the continuing constitutional validity of long-practiced invasions of body or home.'' Brief of Respondent at 15 n.24. In his haste to dismiss history, Respondent distorts statements from inapplicable cases.

When the historical analysis which this Court has previously used to identify fundamental rights protected under the right of privacy is used, there can be little question about the result. As Petitioner discussed in his original brief, western history, including the common law, has unanimously considered sodomy to be within the proper scope of government regulation.[2] As the privacy decisions of this Court establish, in our society various ''zones of

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[2]A case not cited in Petitioner's original brief is *Woodson v. North Carolina*, 428 U.S. 280 (1976). There the Court noted that at the time of the Revolution there were in the colonies from ten to eighteen capital offenses ''typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and *sodomy*.'' *Id.* at 289 (emphasis added).

privacy'' have historically and traditionally been considered beyond the proper reach of government. *Roe v. Wade,* 410 U.S. at 152. But the practice of sodomy, even in a private and consensual setting, has never been considered to be within such a ''zone of privacy.'' Indeed, Respondent acknowledges as much by his failure to discuss the teachings of history.

Respondent seemingly argues that this Court should simply pull a standard for reviewing the Georgia sodomy statute out of thin air. He rejects the historical analysis which this Court has previously used in its privacy decisions and instead makes reference to the current decriminalization movement. Brief of Respondent at 13-14 n.23. Respondent then remarks that the ''remaining division among the states over this issue [cannot] be viewed simply as a benign patchwork of legislative experiments.'' *Id.* To describe sodomy laws as an ''experiment,'' after two thousand years of western history, is absurd. The only experiments occurring in this area are in states where sodomy has been decriminalized. Respondent's groping for authority illustrates the confusion which would result from abandoning history in the development of the right of privacy.

II. OUR CONCEPT OF ORDERED LIBERTY DOES NOT PROTECT ALL INTIMATE RELATIONSHIPS BETWEEN CONSENTING ADULTS FROM GOVERNMENT REGULATION

Respondent cites two ''basic values'' which, according to his argument, place the consensual and private practice of sodomy beyond the proper scope of government regulation. One of these ''basic values'' is that of

"intimate association." Respondent lobbies for expansion of the right of privacy to all consensual "*sexual* activities and relationships." Brief of Respondent at 12 (emphasis in original). Respondent asks the Court to recognize "the right to engage in sexual intimacy as such." *Id.* Of course, Respondent would extend this right to "intimate sexual contacts between persons of the *same* sex." Brief of Respondent at 13 (emphasis in original).

Respondent strains mightily to support his argument for this "right to engage in sexual intimacy." He gratuitously quotes *Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244 (1984). In that case, the Court upheld the constitutionality of a Minnesota law which had been applied so as to require the United States Jaycees to admit women to its local chapters in Minnesota. The Court rejected the argument that the application of the law to the Jaycees infringed male members' freedom of intimate association. In reaching this conclusion, the Court cited a number of its privacy decisions and stated: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." 104 S.Ct. at 3250. The Court went on to say that only a limited number of relationships are entitled to such protection:

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage, [cit. omitted]; the raising and education of children, [cit. omitted]; and cohabitation

> with one's relatives, [cit. omitted]. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life. Among other things, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of their relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Id. at 3250-51. There is obviously no support for Respondent in these words. Rather, the Court suggests in *Roberts* that the intimate associations entitled to constitutional protection are few in number and revolve around those familial relationships which are crucial to the history and traditions of this society.

Respondent also attempts to generate support for this "right to engage in sexual intimacy" by recasting the Court's privacy decisions. Respondent argues that in the contraception and abortion cases more than marriage, childbearing, and family are protected. Respondent argues that the underlying act of sexual intimacy itself is protected in these decisions. Brief of Respondent at 10-13. Respondent argues that the right to use contraceptives, on the part of both married and unmarried persons, carries with it recognition of the protected nature of all consensual sexual intimacy. Respondent rejects the characterization of these and the other privacy cases as having only to do with decisions and activities relating to marriage, family, childbearing, and child rearing. *Id.*

The best way to examine Respondent's hypothesis is by looking at the text of the Court's privacy decisions. Does the language of the Court's decisions support, as Respondent would have it, a "right to engage in sexual intimacy"? Although *Griswold* was concerned with the use by married persons of contraceptives, *Griswold*, 381 U.S. at 480, 485-86, the Court has since recognized that the right of privacy applies to activities and decisions of unmarried persons as they relate to childbearing or procreation. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court held, under the Equal Protection Clause, that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike." *Id.* at 453. In a more recent case, *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court has summarized the contraception cases as follows: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey*, 431 U.S. at 687. The abortion cases stand for the same principle: government regulation of decisions and activities relating to childbearing and family are beyond the proper scope of government regulation. The Court has described *Roe v. Wade* as holding, regarding the right of privacy, that "[c]entral among these protected liberties is an individual's 'freedom of personal choice in matters of marriage and family life.'" *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983), *quoting Roe v. Wade*, 410 U.S. at 169 (Stewart, J., concurring). In *Akron Center*, the Court added: "The decision in *Roe* was based firmly on this long-recognized and essential element of personal liberty." 462 U.S. at 427.

It can thus be seen that the Court's previous privacy decisions, in particular those relating to contraception, do not extend a "right to engage in sexual intimacy as such." The right which Respondent urges is tantamount to the proposition declined by the Court in *Roe v. Wade* that there is "an unlimited right to do with one's body as one pleases." 410 U.S. at 154. All of the Court's privacy decisions are carefully circumscribed so as to avoid implying any such right.

Without history, the line drawn by the Court's previous privacy decisions might be difficult to comprehend and Respondent's difficulties may stem from his having left history outside the door. As the Court has repeatedly said, and as Petitioner has discussed in this brief and his principal brief, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Roe v. Wade*, 410 U.S. at 152. Our history supports the view that matters involving marriage, family and childbearing should be free from state regulation. But our history does not support any "right to engage in sexual intimacy as such." It does not observe any right to engage in sodomy or sexual intimacies such as adultery, fornication, incest, or bestiality. Respondent may not like these historical facts, and presumably his ideal society would not countenance such regulations, but this is our history.

Although it might please Respondent to extend the right of privacy to all consensual "*sexual* activities and relationships," Respondent's Brief at 12, there comes a time in the development of any constitutional doctrine to draw a line. As is discussed above, this Court has previously declined to extend the right of privacy to the prop-

osition that "one has an unlimited right to do with one's body as one pleases." *Roe v. Wade*, 410 U.S. at 154. Petitioner urges this Court to reaffirm this limitation. As has been pointed out, such a limitation is required by the historical approach which the Court has previously followed in the development of the right of privacy.

In other areas, the Court has also been forced to draw lines. For example, in *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." *Id.* at 568. Since *Stanley*, it has been argued that if there is a right to possess obscene material in the privacy of the home, there is "a correlative right to receive it, transport it, or distribute it," *United States v. Orito*, 413 U.S. 139, 141 (1973), or "to acquire it or import it from another country." *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 126-27 (1973). In refusing to extend *Stanley*, the Court made these instructive comments about the development of legal doctrines:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." Perspectives may change, but our conclusion is that *Stanley* represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, *Stanley* would not be the law today.

Id. at 127.

Petitioner submits that the present case is also one for line drawing. As with respect to *Stanley,* it is clear that if the right of privacy first recognized in *Griswold* had not been limited to matters concerning marriage, family, and childbearing, *Griswold* and its progeny would not be the law today. Indeed, Chief Justice Warren and Justices Goldberg and Brennan joined the majority opinion in *Griswold* on the understanding that "'[a]dultery, homosexuality and the like are sexual intimacies which the State forbids'" and that the right of privacy recognized in *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." 381 U.S. at 498-99 (Goldberg, J., joined by Chief Justice Warren, and Brennan, J.). It is also clear that Justice Harlan concurred in *Griswold* on the understanding that "adultery, homosexuality, fornication, and incest . . . however privately practiced" are subject to state proscription. *Poe v. Ullman,* 367 U.S. 497, 552-53 (1961) (Harlan, J. dissenting).

Should the Court recognize a "right to engage in sexual intimacy as such," as proposed by Respondent, it is clear that at least all sexual activities which can be called private and consensual would be legalized. This would certainly include polygamy, homosexual marriage, fornication, adultery, and some cases of incest. Respondent's argument that polygamy and homosexual marriages would not be legalized is disingenuous. In *Zablocki v. Redhail,* 434 U.S. 374 (1978), the Court said that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due

Process Clause." *Id.* at 384. The right of privacy has thus already been extended to marriage. If, therefore, the right of privacy is extended to sodomy and all other consensual "*sexual* activities and relationships," persons involved in those relationships will also have the right to marry one another.

III. OUR CONCEPT OF ORDERED LIBERTY DOES NOT PROTECT ALL ACTIVITIES WHICH OCCUR IN THE PRIVATE HOME FROM GOVERNMENT REGULATION

Respondent argues that "the sanctity of the home" is another of the "basic values" which requires affirmance of the Eleventh Circuit. Brief of Respondent at 9. He argues that our concept of ordered liberty requires that the private home be free from government regulation of consensual sexual activities. *Id.* at 14-19.

Respondent supports his plea for the sanctity of the home from government regulation by citing a number of cases decided under the Fourth Amendment. Respondent seems to claim that the Fourth Amendment not only forbids unreasonable searches and seizures in the private home but also forbids government regulation of certain activities which occur in the private home. Respondent says: "The substantive protection of the privacy of the home is what gives the express procedural guarantees of the Fourth Amendment their meaning." Brief of Respondent at 18. Respondent's argument is burdened with a number of fallacies.

The Fourth Amendment does protect a right of privacy. In *Payton v. New York*, which is cited by Respondent on this point, the Court said: "The Fourth Amend-

ment protects the individual's privacy in a variety of settings." 445 U.S. at 589. In many other cases, the Court has also referred to "the right to privacy embodied in the Fourth Amendment." *Oliver v. United States*, — U.S. —, 104 S.Ct. 1735, 1741 (1984). *See also Mapp v. Ohio*, 367 U.S. 643, 655, 660 (1961). The Fourth Amendment protects against certain governmental intrusions. *Winston v. Lee*, — U.S. —, 105 S.Ct. 1611, 1616 (1985) ("the Fourth Amendment generally protects the 'security' of 'persons, houses, papers, and effects' against official intrusions"); *Payton*, 445 U.S. at 587 (" 'Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment' "). Included within this protection is security of "intimate activities . . . from government interference or surveillance." *Oliver*, 104 S.Ct. at 1741. But the "Fourth Amendment's right of privacy," *Mapp*, 367 U.S. at 655, does not protect against government regulation of activities which occur in the private home. The right of privacy embodied in the Fourth Amendment only "protects two types of expectations, one involving 'searches' and the other 'seizures.'" *United States v. Jacobsen*, — U.S. —, 104 S.Ct. 1652, 1656 (1984).

The Court has clearly held that the Fourth Amendment does not deliver a general right of privacy which, as Respondent would have it, forbids all government regulation of private activities in the home. In *Katz v. United States*, 389 U.S. 347 (1967), the Court ruled:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution

> protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Id. at 350-51 (emphasis in original) (footnotes omitted). In a footnote, the Court added: "Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." *Id.* at 350 n.5.

Respondent's argument that this Court should set aside the private home as an enclave insulated from government regulation is without support from either the Fourth Amendment or the right of privacy developed in *Griswold* and its progeny. Although special protection has been extended under the Fourth Amendment to the private home against unreasonable searches and seizures, *Payton,* 445 U.S. 589-90, that Amendment primarily "protects people, not places." *Katz,* 389 U.S. at 351. *See also id.* at 353. Moreover, the right of privacy recognized in *Griswold* and its progeny has not been focused on particular places. The use of contraceptives and the procurement of abortions are protected under the right of privacy whether they occur in a home, hotel, hospital, or office building.

Another Fourth Amendment case from which Respondent seeks support is *Olmstead v. United States,* 227 U.S. 438 (1928). The holding of the majority in *Olmstead* that wiretapping and the use of evidence obtained in that manner did not violate the Fourth or Fifth Amend-

ments was overruled in *Katz*. In his famous dissent, Justice Brandeis stated his view that the Fourth and Fifth Amendments conferred a "right to be let alone." *Id.* at 478. It is clear, however, that Justice Brandeis did not regard the Fourth or Fifth Amendments as delivering a general right of privacy. His "right to be let alone" was simply the right under the Fourth Amendment not be subjected to unreasonable searches and seizures and the right under the Fifth Amendment not to have evidence obtained from such sources used in evidence against one. *Id.* at 478-79. Respondent fails to note the limitations of Justice Brandeis' "right to be let alone." Brief of Respondent at 7. Respondent's use of Brandeis' statement is doubly inappropriate because Brandeis, of course, had no conception of a general right of privacy as was first accepted in *Griswold*. As the Court recognized in *Winston*, the "right to be let alone" spoken of by Justice Brandeis is the Fourth Amendment right against governmental intrusions in the form of unreasonable searches and seizures. 105 S.Ct. at 15-16.

Respondent also cites *Stanley v. Georgia*, 394 U.S. 557 (1969), in support of his argument that the private home should be free from government regulation. Of course, *Stanley* was decided under the First Amendment, *id.* at 565 568, and, as was noted above, has been strictly limited to its facts. *See United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123 (1973). Another reason for doubting the applicability of *Stanley* is that, as the Court pointed out in *12 200-Ft. Reels*, "Three concurring Justices indicated that [*Stanley*] could have been disposed of on Fourth Amendment grounds without reference to

the nature of the materials." *Id.* at 126, *citing Stanley,* 394 U.S. at 569 (Stewart, J., joined by Brennan and White, JJ., concurring). Just as the Court has refused to expand *Stanley* in other contexts, the Court should similarly refuse to expand that decision in the manner urged by Respondent.

Respondent's proposal is so expansive that all private activities, not already legalized by his argument for a constitutional "right to engage in sexual intimacy," would be legalized by this argument for the insulation of the private home. Certainly, there could be no meaningful distinction between the protection of sodomy in the private home and the protection of the private use and possession of controlled substances there. The same is true of laws regulating private gambling. Furthermore, no meaningful distinction could be maintained between private activities which occur in the home and private activities which occur elsewhere. Respondent's proposal would require all such regulations to satisfy the virtually impossible compelling interest standard.

IV. CONCLUSION

Respondent's arguments may furnish persuasive policy grounds for the decriminalization of all intimate activities and all activities which occur in the privacy of the home. But his proposals are nonsense as constitutional law. Respondent totally confuses the concepts of legislative desirability and constitutional requirement. Not all things good and desirable are required by the Constitution. This Court has recognized the principle that "the Fourteenth Amendment gives the federal courts no power to

impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). *See also Evans v. Abney*, 396 U.S. 435, 447 (1970) ("The Responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land and not to legislate social policy on the basis of our own personal inclinations."). Under the Tenth Amendment, the States are free to have different laws on the subject of sodomy as long as their respective laws are consistent with the Constitution. As Justice Harlan said in his famous dissent in *Poe v. Ullman*, "Every society in civilized time has found it necessary to deal" with more than just "the physical well-being of the community." Society also, as he pointed out, "has traditionally concerned itself with the moral soundness of its people." 367 U.S. at 545-46.

For the reasons stated here and in Petitioner's original brief, the Court should reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, and
JOHN and MARY DOE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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No. 85-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner

v.

MICHAEL HARDWICK, and
JOHN and MARY DOE,
Respondents.

BRIEF FOR THE CATHOLIC LEAGUE FOR RRELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), a voluntary, non-profit association, national in membership, is organized, *inter alia*, to promote the public welfare and to preserve the integrity of the family, the rights of parents and children, and the validity of laws that serve those ends. With respect to the instant case, the League is directly concerned with the proper construction of the Constitution and alleged "fundamental" rights thereunder as they promote or undermine the integrity of family and social relations. The League is especially concerned with attempts to create by false theories of "autonomy" privacy, new and absolute constitutional immunities from state regula-

tion of sexual conduct that go beyond the traditional privacy of marriage, marital intimacy, procreation and childbearing. Accordingly, the League, with letter permission of the counsels of record for the parties involved, files this amicus brief.

SUMMARY OF ARGUMENT

As noted by the Court below: "This suit . . . presents an anticipatory challenge to the state [sodomy] statute," 760 F.2d at 1205, in the absence of allegation or record evidence of any pending or threatened prosecution against any of the complaining parties. For purposes of argument and analysis, it is important to note that this case does not rest upon a constitutional claim of "zonal" privacy which protects all individuals from unreasonable searches and seizure, but only presents a theory of constitutional "autonomy" privacy specifically with respect to homosexual conduct, which, in turn, rests upon a fundamental right claim that is totally unsupported by constitutional text or history, and is flatly contrary to centuries of Anglo-American tradition and laws.[1]

With respect, it is submitted that the Circuit Court below erred in holding: (a) that Hardwick had standing, in the circumstances, to bring this suit; and further (b) that he had a "fundamental" constitutional right to practice homosexual sodomy.

Hardwick should have been denied standing in this case on either or both traditional tests for standing, namely, that his alleged injury by the challenged statute was not sufficiently material or imminent to justify constitutional adjudication; and that prudential discretion against granting standing should have been exercised for lack of a sufficient record of enforcement experience or of state review of the challenged statute. The same reasons which led all judges below to deny standing to sue to John and Mary Doe, should have applied equally to deny standing to Hardwick.

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[1] The privacy claims of married couples as raised by plaintiffs, John and Mary Doe were not reached, since their case was dismissed for lack of standing. 760 F.2d at 1206-07. The issue of marital "autonomy" privacy is clearly distinct from homosexual relations and is not here relevant.

The caution which the Supreme Court itself has recently exercised in limiting review of homosexual rights claims, viz. of public school teachers and other public officials,[2] should have counseled the court below against venturing, on the flimsiest of records, an essentially advisory constitutional ruling with momentous potential to undermine state power to control or regulate homosexual conduct, and its promotion in situations far beyond the isolated incident that Hardwick has seized upon.

With respect to its finding of a constitutional right to practice consensual homosexual sodomy in private, the majority ruling erred in several respects. It failed to follow, and seriously misapplied, this Court's decision in *Doe v. Commonwealth's Attorney,* by a construction that is strained and contrary to the interpretation adopted by other circuits. Dissenting Circuit Judge Kravitch noted: "The United States Supreme Court, in *Doe v. Commonwealth's Attorney* . . . summarily affirmed the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute nearly identical to Georgia's." 760 F.2d at 1213 (citations omitted). In *Dronenburg v. Zech,* 743 F.2d 1388 (D.C. Cir. 1984), the Court flatly rejected the very argument adopted by the majority panel below: "[W]e doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind." *Id.* at 1392; *accord: Baker v. Wade,* 769 F.2d 289 (5th Cir. 1985).

Instead the majority panel below collected snippets of dicta from marital privacy and pregnancy regulation opinions to construct a privacy right which it admitted has not to date been recognized in constitutional law. *See* 760 F.2d at 1210. The majority below thus gave greater weight to dicta stitched from unrelated Supreme Court footnotes and opinions on mar-

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[2] *See, e.g., National Gay Task Force v. Board of Education,* 729 F.2d 1270 (10th Cir. 1984) *aff'd by equally divided court,* 105 S. Ct. 1858 (1985). *Rowland v. Mad River Local School District,* 730 F.2d 444 (6th Cir.), *cert. denied,* 105 S. Ct. 1373 (1985); *Gaylord v. Tacoma School District,* 88 Wash. 2d 286, *cert. denied,* 434 U.S. 879 (1977). *See also* W. Valente, *Education Law* §§ 13.11; 15.50 (1985).

riage and pregnancy,[3] than it gave to Supreme Court rulings in cases directly concerned with homosexual conduct. Its confusion of the nature of fundamental rights in marriage, pregnancy and family relations with sexual gratification by homosexual conduct has no support in constitutional authority or in the traditions that underlie fundamental rights theory.

The creation of a new constitutional right to practice homosexual sodomy has great potential to undermine the government protection of public interests controlling homosexuality in public, civil and military service, public health, public education, and the operational freedom of religious and quasi-public private associations. Nor is there any other overriding public policy consideration which militates in favor of extending constitutional protection to homosexual conduct and which would justify avoidance of this Court's controlling precedent of *Doe v. Commonwealth's Attorney*.

ARGUMENT

I.

HARDWICK DOES NOT HAVE STANDING TO PURSUE THIS MATTER.

The court of appeals correctly determined that a married couple, the Does, did not have standing to pursue this matter. 760 F.2d at 1206-07. The court of appeals should also have found that Hardwick lacked standing.

The Does were not threatened with criminal prosecution. Although Hardwick was initially prosecuted, his prosecution was not carried forward. 760 F.2d at 1204. There is nothing to support the conclusion that the state would carry through with a future prosecution of Hardwick or other homosexuals for violation of the sodomy law. The combination of Hardwick's unpursued prosecution, Hardwick's continued

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[3] *See* 760 F.2d at 1211-1213. The majority invocation of *Eisenstadt v. Baird* (760 F.2d at 1212) is unsound in two respects—*Eisenstadt* involved contraception rights, and "*Eisenstadt* . . . did not explicitly rely on . . . fundamental rights-strict scrutiny analysis." J. Nowak, R. Rotunda, J. Young, *Constitutional Law*, 739 (2d ed. 1983). *See also* G. Gunther, *Cases and Materials on Constitutional Law*, 514-15 (11th ed. 1985).

engagement in sodomy and Hardwick's general statements concerning Atlanta police enforcement practices are insufficient to constitute the real threat of prosecution necessary for an anticipatory challenge of the statute. *Compare Younger v. Harris*, 401 U.S. 37, 42 (1972) *with Steffel v. Thompson*, 452 U.S. 452, 459 (1974). In this case Hardwick's alleged threat of prosecution is nearly as "imaginary or speculative"[4] as the Does'.[5]

Even when a case or controversy exists the Court will exercise its prudence to deny standing to parties in situations in which anticipatory constitutional challenges may not be appropriate. *See Poe v. Ullman*, 367 U.S. 497, 509 (1961). This case is an excellent candidate for exercise of such prudence. As just demonstrated, the injury Hardwick alleges is extremely speculative. There is not a strong record of enforcement experience or state review of the statute. Further, this case could have an impact far beyond the facts of this matter.[6] The caution which this Court has recently exercised in choosing not to review certain general homosexual rights claims[7] and other homosexual rights claims involving public school

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[4] *Younger*, 401 U.S. at 42.

[5] As discussed below, amicus disagrees with the court of appeals' conclusion that *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975) was based upon a lack of standing. However, if this were the case the court of appeals should also have been led to dismiss Hardwick's claim for lack of standing. *Cf.*, 760 F.2d at 1214 (Kravitch, J., concurring in part and dissenting in part). The court of appeals cannot have it both ways.

[6] *See infra*, p. 12.

[7] *See New York v. Uplinger*, 104 S. Ct. 2332 (1984); *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981).

teachers and public officials[8] should counsel against deciding, on the flimsiest of records, an important constitutional ruling with possibly devastating consequences.

II.

HOMOSEXUALS' ENGAGEMENT IN SODOMY IS NOT PART OF THE RIGHT TO PRIVACY PROTECTED BY THE UNITED STATES CONSTITUTION.

The decision below is contrary both to governing precedent of this Court, and to any reasoned, policy-based construction of this Court's precedents in other areas of privacy.

A. The Court of Appeals' Decision is Contrary to this Court's Decision in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975).

All of the court of appeals judges agreed that this Court's decision in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975) constitutes a binding precedent on the lower courts. *See* 760 F.2d at 1207-08, 1213-16. In *Doe*, this Court summarily affirmed a district court decision that homosexual sodomy was not protected as a constitutional privacy right. As above noted, the dissenter below, the district judge below, and two other courts of appeals, quite properly decided that *Doe* was a decision on the merits of the privacy claim.[9] However, the majority

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[8] *See, e.g., National Gay Task Force v. Board of Education*, 729 F.2d 1270 (10th Cir. 1984) *aff'd by equally divided court*, 105 S. Ct. 1858 (1985). *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir.), *cert. denied*, 105 S. Ct. 1373 (1985); *Gaylord v. Tacoma School District*, 88 Wash. 2d 286, *cert. denied*, 434 U.S. 879 (1977). *See also* W. Valente, *Education Law* §§ 13.11; 15.50 (1985).

[9] *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985); *Hardwick v. Bowers*, 760 F.2d 1202, 1213-1216, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3292 (U.S. Nov. 4, 1985) (No. 85-140) (Kravitch, J., dissenting); *Dronenburg v. Zech*, 741 F.2d 1388, 1391-1392, *reh'g denied*, 746 F.2d 1879 (D.C. Cir. 1984); *Hardwick v. Bowers*, Civil Action No. C83-273A (N.D.Ga. April 15, 1983).

below sought to distinguish away *Doe* by reading it as confined to the issue of standing-to-sue. *See* 760 F.2d at 1207-08. That reading is not only contrary to the record and other authorities, but is manifestly gratuitous. There is nothing whatsoever in the opinion of the majority panel below which supports its reconstruction of the *Doe* decision from a clear decision that denied a homosexual conduct right of privacy (as here claimed) into a decision exclusively based on standing to sue.

The attempt by the majority below to support its narrowed reading of *Doe,* by reference to footnote exchanges in *Carey v. Population Services,* 431 U.S. 678, 688 n.5 (1977) (majority opinion), 694 n.17 (plurality opinion) and 718 n.2 (dissenting opinion) fails in that the majority and plurality opinions in *Carey* were not concerned with undecided constitutional issues. Rather, the *Carey* majority recognized *Doe* as binding precedent on consensual homosexual activity. *See* 760 F.2d at 1214-1215 (Kravitch, J., concurring in part, dissenting in part).

The further attempt by the majority below to avoid *Doe v. Commonwealth's Attorney,* by citation to post-*Doe* doctrinal developments,[10] must also fail. The Supreme Court dicta invoked by the court below, as shown in the next section of this brief, was drawn from judicial comment totally unrelated to homosexual conduct, i.e., from statements regarding heterosexual relations in the context of pregnancy or marriage. Apparently the court below equated homosexual rights with the rights of married couples or of pregnant females.[11] As will be seen, such an extension is totally unsupported by the policy foundations that underlie the latter cases and has been flatly rejected in other recent court of appeals decisions.

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[10] "Even if *Doe* had been resolved on the constitutional grounds now asserted . . . the Supreme Court has indicated since that time that the constitutionality of statutes such as the one in question . . . is not governed by *Doe,* but rather, remains an open question."760 F.2d at 1208 (citation omitted).

[11] *See* 760 F.2d at 1211-13.

B. The Court of Appeals' Decision is Contrary to a Reasoned, Policy-based Construction of this Court's Privacy Precedents.

Even if *Doe* were not controlling precedent, a reasoned, policy-based construction of this court's privacy decisions would require rejection of the claim that homosexuals' engagement in sodomy is part of the Constitution's privacy right.

The constitutional right to privacy evolved from beginnings quite far removed from the circumstances involved in this case. Indeed, the inaugural personal rights privacy cases, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), involved the protection of parents' rights in childrearing and education under the "liberty" component of the Due Process Clause. It would be most difficult to discern a connection between these traditionally cherished parental interests in rearing families and the privacy right to homosexual sodomy fashioned by the court of appeals.[12] Predictably, the court of appeals attempted to utilize *Griswold v. Connecticut*, 381 U.S. 479 (1965) to justify its finding of a privacy right for homosexual sodomy. *See* 760 F.2d at 1211-1212. This action reflects the fact that *Griswold* is the foundation upon which all modern privacy adjudication is built. In *Griswold* this Court used several different analyses to find that married people had a constitutional privacy right to use artificial contraceptives. At the center of the Court's reasoning was the interference the involved statute caused to the normal incidence of the marital relationship. Emphasizing the central role of the marital relationship in its decision the *Griswold* Court noted:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being secret.

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[12] This Court does not have before it the question of prohibitions on sodomy in marriage and should not resolve this unnecessary issue.

381 U.S. at 486. As so construed one could arguably see how an interference with decisions about childbearing in marriage might implicate the family-oriented rights protected in *Pierce* and *Meyer*.

Griswold gave rise to a number of different lines of cases construing this privacy right. Several of these lines may be said to fairly clearly fit within the family-based rationale of *Pierce, Meyer,* and *Griswold.* For example, this Court has found that a right to marry inheres in the privacy right.[13] A family basis is also clear in the Court's cases finding rights of related individuals to live together which do not extend to unrelated individuals.[14] This same fidelity to family interests as the foundation of privacy rights can also be found in a case involving the interests of natural married parents in preservation of custody of their children[15] and in the Court's refusal to find that foster parents, lacking any natural or adoptive familial relationship, have any privacy rights in continued custody of their children.[16] None of these cases, grounded as they are in the traditional family framework, provide any support for a privacy right for totally unrelated people to engage in homosexual sodomy. Indeed, the rejection of privacy interests for "unrelated" individuals requires the conclusion that the cases would support no privacy interest in this context.[17]

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[13] *See Zablocki v. Redhail,* 434 U.S. 374, 383-85, 386 (1978); *Loving v. Virginia,* 388 U.S. 1, 12 (1967).

[14] *Compare Moore v. City of East Cleveland,* 431 U.S. 494 (1977) *with Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

[15] *See Santosky v. Kramer,* 455 U.S. 745, 753-54 (1982).

[16] *See Smith v. Organization of Foster Families,* 431 U.S. 816 (1977).

[17] Cases in which this Court has found a privacy interest of an unmarried natural parent in custody of his or her children also do not provide any support for the notion that the privacy rights of family life automatically attach to all sexual activity and its consequences. In this Court's most recent decision on this issue the Court noted that: *"Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."Lehr v. Robertson,* 463 U.S. 248, 260 (1983) (emphasis in original) (quoting from *Caban v. Mohammed,* 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

While each of the cases discussed to this point may be readily distinguished from the instant case based upon their relationship with matters of family life, this relationship to family matters is less clear in other cases. It might be argued, for example, that the right to procreate is a right totally independent of family life. However, the cases upon which the right to procreate is based appear to look toward the family-oriented value of procreation during marriage and do not seem to establish a right to procreate outside of marriage. *See Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942) (stating that *marriage and procreation* were fundamental). Indeed, one of the justifications cited for recognizing a fundamental right to marriage in *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978) was the fact that the right to procreate must imply the right to enter the only relationship in which the involved state had legalized procreation.[18] Thus, the right to procreate, in itself, has never been fully divorced from the family setting.

The set of personal privacy cases which bear the least relationship to traditional family concerns are *Eisenstadt v. Baird,* 405 U.S. 438 (1972), *Roe v. Wade,* 410 U.S. 113 (1973)[19] and *Carey v. Population Services International,* 431 U.S. 678 (1977). For this reason these cases obviously have the least validity as part of the Constitution's privacy rights. Yet, upon a thorough, policy-based examination, even these cases do not provide any real support for a privacy right to engage in homosexual sodomy.

Eisenstadt v. Baird, 405 U.S. 438 (1972), represented the first attempt to extend privacy rights beyond the traditional family context. *Eisenstadt* does not, however, establish an individual autonomy privacy right to engage in sexual activity of any type. Initially, it is important to remember that

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[18] The *Zablocki* Court made no suggestion that a restriction of sex outside marriage was unconstitutional. Instead, it relied upon this restriction as a basis for holding that there was a fundamental right to marriage.

[19] In citing *Roe* in this context amicus also includes the later abortion rights cases which are grounded upon *Roe.*

the lead opinion in *Eisenstadt* was merely a plurality opinion which did not receive the support of a five-member majority of the Court. Thus, language contained in *Eisenstadt* is of limited precedential value. Further, Justice White, together with Justice Blackmun, cogently criticized the lead opinion on the basis that it did not need to reach the question of the constitutionality of prohibition of distribution of contraceptives to the unmarried. *See* 405 U.S. at 465 (White, J., concurring in the result). Accordingly, the lead opinion in *Eisenstadt* is of questionable value.

However, even the *Eisenstadt* lead opinion does not support an individual autonomy privacy right to engage in sexual activity. The lead opinion stated only that, under the facts of that case, the state could not justify a marital status-based limitation on a matter "so fundamentally affecting a person as the decision whether to bear or beget a child."405 U.S. at 453. Thus, the lead opinion was based upon an equal protection-rational basis analysis rather than a fundamental right-strict scrutiny analysis. *See* 405 U.S. at 446-455. *See also* G. Gunther, *Cases and Materials on Constitutional Law*, 514-515 (11th ed. 1985); J. Nowak, R. Rotunda, J. Young, *Constitutional Law*, 739 (2d ed. 1983). *Eisenstadt* does not support a fundamental right to engage in any sort of activity. Even more importantly, however, the *Eisenstadt* lead opinion is not based upon a right to engage in sexual activity outside of marriage, but only upon interference with certain childbearing decisions. Indeed, the lead opinion itself recognized the legitimacy of state treatment of marital sexual activity in a manner different from its treatment of premarital and extra-marital sexual activity. *See* 405 U.S. at 448. This conclusion is merely an affirmation of positions taken in *Griswold* by concurring Justices Goldberg, 381 U.S. at 498-99, and White, 381 U.S. at 505, who had noted that a privacy-based right of contraception would have no effect on state prohibitions of fornication, adultery or homosexuality. *Eisenstadt*, even if inappropriately accorded strong precedential value, does not support an individual autonomy privacy right to engage in any form of sexual activity. Even more clearly, its foundation upon the traditionally

family-oriented decision of whether to bear or beget a child, provides absolutely no support for an autonomy privacy right to homosexual sodomy, a case in which the childbearing decision is not even remotely involved.

Eisenstadt's "decision to bear or beget a child" analysis carried over to this Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* is important in this case because of the limits it places on the privacy right. The *Roe* court found that the privacy-based "decision to bear or beget a child" included a qualified right to decide to have an abortion. 410 U.S. at 153-154. Interestingly, the Court noted that it had not previously recognized "an unlimited right to do with one's body as one pleases"[20] and that it failed to discern a close relationship between this idea and the right of privacy. *See* 410 U.S. at 154. *Roe*, again, is nothing more than a decision recognizing rights this Court felt were associated with the "decision whether to bear or beget a child." Its language provides no sanction for a privacy right outside the contexts of the family relationship or the decision whether to bear or beget a child. Indeed, its refusal to find a constitutional right to bodily autonomy indicates an unwillingness to extend privacy rights to include any activity which could be characterized as "sexual."

In spite of the significance the court of appeals attached to this Court's decision in *Carey v. Population Services International*, 431 U.S. 678 (1977), even that case was carefully limited to rights associated with the decision whether to bear or beget a child. The Court's analysis described *Griswold*, *Eisenstadt* and *Roe* as holding that the "decision whether to bear or beget a child" was constitutionally protected. *See* 431 U.S. at 685-686, 687-689. The *Carey* Court refused to modify *Roe*'s refusal to find a right of bodily autonomy included within the privacy right. In fact, the Court explicitly held that its decision found no right to be free from limits on sexual freedom or burdens on consensual sexual relations. 431 U.S. at 688 n.5. Instead, it noted its decision involved only burdens on rights previously found to constitute protected childbearing decisions. *Id.* This fact was clearly

[20] 410 U.S. at 154.

emphasized in separate opinions of particular Justices. For example, both Justices White and Stevens rejected the existence of a constitutional right for minors to engage in premarital sexual activity. *See* 431 U.S. at 702-703 (White, J., concurring in part and concurring in the result); 431 U.S. at 713 (Stevens, J., concurring in part and concurring in the judgment). Similarly, Justice Rehnquist observed that, at a minimum, the homosexual sodomy involved in this case was outside the relevant scope of protection. 431 U.S. at 718 n.2 (Rehnquist, J., dissenting). Quite clearly, *Carey* provides no support for the extension of privacy rights to homosexual activity.[21]

Even though previous decisions of this Court provide no sanction for a right to engage in homosexual sodomy, there remains the question of whether this activity should now be

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[21] The remaining personal privacy decision which might be applicable is *Stanley v. Georgia*, 394 U.S. 557 (1969). The court of appeals utilized this decision as one of the bases upon which it found a privacy right to homosexual sodomy. *See* 760 F.2d at 1212. However, *Stanley* is of little relevance in this matter. First, *Stanley* is inapplicable unless a court finds an underlying constitutionally protected interest. Without such an interest *Stanley*'s right to be free from interference in the home is irrelevant. In *Stanley* there existed an underlying First Amendment right to possess literature in the home which was then buttressed by a privacy right. The necessity of an underlying constitutional right explains why the *Stanley* Court could confidently claim its decision would not constitutionally protect private possession of items, such as drugs, when the possession does not independently enjoy First Amendment or other constitutional protection. 394 U.S. at 568 n.11. As was just discussed, and will be further discussed, homosexual sodomy does not enjoy the same type of underlying constitutional protection as does the right to privately read certain materials. It is not one of the family-oriented activities or decisions relating to bearing or begetting of a child which raid constitutional privacy interests. Thus, there does not exist the underlying constitutional interest necessary to allow constitutional protection under the *Stanley* analysis. *Stanley* is also of little relevance because it involves regulation of possession of reading material designed only for the mind and does not involve actual physical conduct. *See Stanley*, 394 U.S. at 565-566. The *Stanley* Court was careful to note that mere possession of reading material raised entirely different questions from the regulation of conduct. *See id.* at 565-567. While one may privately read about actions ranging from murder to bestiality, one does not have the same right to engage in all of these activities in the privacy of one's home.

determined for the first time to be part of the constitutional privacy right. Such a question must be answered negatively. The right to engage in homosexual sodomy simply is not a right which can be considered "implicit in the concept of ordered liberty." *See Roe,* 410 U.S. at 152. This activity is not even remotely part of traditional family concerns or child begetting and bearing functions. It is an activity which has been traditionally condemned rather than considered a foundation of our society. *See Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985); *Dronenburg v. Zech,* 741 F.2d 1388, 1396, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984). This factor mitigates against the recognition of homosexual sodomy as a protected right. *See Moore v. City of East Cleveland,* 431 U.S. 494, 501-504 (1977) (plurality opinion); *Griswold v. Connecticut,* 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment); *Poe v. Ullman,* 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (recognizing that adultery and homosexuality were outside the scope of traditionally and constitutionally protected marital activity); *Dronenburg v. Zech,* 741 F.2d at 1396 (noting traditional condemnation of homosexual activity in finding this activity not to be included in right of privacy). *Cf. Baker v. Wade,* 769 F.2d at 292 (noting traditional condemnation of homosexuality as a justification of sodomy statute against equal protection attack). In light of the fact that this decision involves the creation of a privacy right in a situation in which not even a remotely related privacy right has previously been found, this case is a most appropriate one for exercise of separation of powers based self-restraint from the temptation to create a new privacy right. *See Dronenburg,* 741 F.2d at 1396-1397 (quoting *Moore v. City of East Cleveland,* 431 U.S. 494, 544 (1977) (White, J., dissenting)). A decision recognizing a constitutional right to engage in homosexual sodomy could have enormous effects upon legislative and executive decisions involving public, civil and military service, public health, public education and the operational freedom of religious and quasi-public private associations. Given these tremendous implications there are few better cases for leaving regulation of an activity to the legislative branch than this one. Accordingly, this Court

should not take this opportunity to create a new constitutional right of homosexual sodomy.

The Court's refusal to create a constitutional right to homosexual sodomy would accord with the weight of court of appeals precedent. *Compare Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *Dronenburg v. Zech*, 741 F.2d 1388, 1391-1398, *reh'g denied*, 746 F.2d 1579 (D.C. Cir 1984) *with Hardwick v. Bowers*, 760 F.2d 1202, 1207-1213, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3292 (U.S. Nov. 4, 1985) (No. 85-140). Of these cases the most significant is *Dronenburg v. Zech*, in which the District of Columbia Circuit independently analyzed the privacy right and concluded that homosexual sodomy was not part of this right. The court's analysis is instructive because it carefully considered this Court's privacy precedents and correctly found no support for the creation of a right to homosexual activity. *See* 741 F.2d at 1391-1397. The *Dronenburg* court concluded its survey by noting:

> In this group of cases . . . we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities related to marriage, procreation, contraception, family relationships, and childrearing and education. It need hardly be said that none of these covers a right to homosexual conduct.

741 F.2d at 1395-96. The *Dronenburg* court's careful approach contrasts markedly with the selective and expansive use of Supreme Court precedent by the court of appeals in the instant case. *See* 760 F.2d at 1211-1213. Similarly, the *Dronenburg* court paid great attention to doctrines of judicial self-restraint and separation of powers in refusing to expand the scope of the privacy right beyond the confines this Court has traditionally given it. *See* 741 F.2d at 1396-1397. The *Dronenburg* court made the following observation in this regard:

In dealing with a topic like this, in which we are asked to protect from regulation a form of behavior never before protected, and indeed traditionally condemned, we do well to bear in mind the concerns expressed by Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 97 S. Ct. 1932, 1958-59, 52 L.Ed.2d 531 (1977):

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the current construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably preempts for itself another part of the governance of the country without express constitutional authority.

741 F.2d at 1396. The concerns isolated by the *Dronenburg* court and Justice White are of particular importance here. This Court should also refuse to create a new and unprecedented constitutional right to engage in homosexual sodomy.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 85-140

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL BOWERS, et al.,
Petitioners

v.

MICHAEL HARDWICK, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF DAVID ROBINSON, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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October Term, 1985

MICHAEL BOWERS, et al.,
Petitioners

v.

MICHAEL HARDWICK, et al.,

Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF DAVID ROBINSON, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is filed pursuant to Rule 36.2 of this Court with the consent of the parties, on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The writer of this brief was engaged in a study of what the legal system might do to help reduce the devastating rate of spread of the AIDS virus when the Court granted certiori in this case. As counsel for petitioners indicated that they would probably not raise the public health concerns before this Court, the author of the present brief decided to do so individually, to present what is believed to be a vitally important dimension of the problem before the Court for its consideration.

SUMMARY OF ARGUMENT

This is a brief of limited focus. It does not argue the important questions of standing, facial invalidity adjudication, historical and contemporary ethical and religious values, federalism, or whether, as a general matter, constitutional privacy protections should be extended beyond their traditional boundaries of procreational freedom to include protection of alternative "life-styles." Instead, it is directed to potential relationships between the decision below and a contemporary catastrophe of historic proportions, the AIDS virus crisis. At present, it is thought that nearly two million Americans are infected, although only

about 15,000 have experienced AIDS, which is simply a terminal phase of an AIDS virus infection. The number of additional people being infected is estimated at perhaps 1000 to 2000 each day. All are believed likely to be infected for life. Many of them will develop AIDS, brain disease, or other devastating AIDS-related illnesses. For various technical reasons, no effective vaccine or treatment is likely to be available in the foreseeable future. The only rational means of responding to this extraordinary tragedy is to change our behavior. The behavior believed to have infected about three-fourths of the victims is sodomy, the subject of the Georgia statute which is under attack in this case. While it is not claimed that the existance of such

statutes is a panacea for dealing with our medical crisis, it is urged that the states should be permitted to reassert traditional values, both to reinforce societal attitudes with respect to what we know to be potentially lethal behavior (whether homosexual or heterosexual), and to permit additional public health responses, such as closure of bathhouses and bars where promiscuous, extraordinarily risky sexual activity takes place. We must be able do what we can, for every AIDS case prevented will save a human life.

In addition, it is urged that the strict scrutiny of the sodomy statute ordered by the lower court constitutes an inappropriate standard of judicial review. The intensity of the state's

interest in protecting the public health should be considered in deciding whether sodomy is a "fundamental right" with a concomitant strong presumption of unconstitutionality with respect to the sexual behavior component of any legal effort to respond to the AIDS virus peril. The alternative to permitting rational actions based on necessarily incomplete information is to tie our hands while thousands become ill and die. Unlike the abortion cases, where the medical evidence indicated that early abortion was no more (and perhaps less) dangerous to maternal health than childbirth, the constitutional freedom to commit sodomy urged upon the Court by the respondents would be dangerous indeed.

Finally, this is not a homophobic brief. It is a labor of love, an effort to help keep homosexuals, and the rest of us, alive.

ARGUMENT

EPIDEMIOLOGICAL CONCERNS, EVIDENCED BY THE AIDS TRAGEDY, ARE INCONSISTENT WITH A RECOGNITION OF A CONSTITUTIONAL RIGHT TO ENGAGE IN SODOMY.

A. The Scope of this Brief

This brief has a limited scope. It does not seek to discuss a number of important issues presented by this case such as (1) the questionable standing

of the respondent (see Los Angeles v. Lyons, 461 U.S. 95 (1983)); (2) the inappropriateness of ruling on the Georgia statute on its face (see Broadrick v. Oklahoma, 413 U.S. 601 (1973)); (3) the historical universality of sodomy prohibitions, and their continued widespread support in the ethical values of contemporary America;[1] and (4) the undesirability of extending constitutional privacy protections beyond the established procreational freedoms to more general

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[1]Four years ago, Congress overwhelmingly rejected an effort to eliminate the sodomy prohibition in the District of Columbia (Washington Post, Nov. 5, 1985, at A5, col. 3.)

matters of lifestyle.[2] Instead this brief is intended to assemble information which may assist the Court in assessing the public health implications of the lower Court's decision (a matter which that court failed to address) and the serious epidemiological concerns which would be heightened if the ruling below were affirmed and imposed on the nation as a whole

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[2]See J. Nowak, R. Rotunda, and J. Young, Constitutional Law, 758 (2d ed., 1983): "...(T)he Court has never indicated that there is any constitutionally guaranteed right to live a particular 'lifestyle.'"

B. The Nature and Epidemiology of AIDS

Acquired immune deficiency syndrome (AIDS) was first medically reported slightly over four years ago, in 1981.[3] Due to a remarkable scientific effort, much is known about AIDS, despite the limited time which has been available to scientific investigators.[4]

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[3]J. Curran, et al., The Epidemiology of AIDS: Current Status and Future Prospects, 229 Science 1352 (Sep. 27, 1985.)

[4]Perhaps the most generally useful single source of current information is V. DeVita, Jr., S. Hellman, and S. Rosenberg, eds., AIDS, etiology, diagnosis, treatment, and prevention

The term "AIDS" was first applied to patients with certain rare cancers and infections prior to the determination of the transmissible agent which was the underlying cause of their illnesses. Much confusion has

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[4] (cont'd) (1985). Drs. DeVita and Rosenberg are respectively the Director and Chief of Surgery of the National Cancer Institute, National Institutes of Health; Dr. Hellman is physician-in-Chief of the Memorial Sloan-Kettering Cancer Center. The contributors are scientists who have been primarily responsible for our knowledge of AIDS. The technical literature is very large; the most recent quarterly Literary Search of the National Library of Medicine (No. 85-16) includes 747 citations. A very recent book designed for lay readers is J. Slaff and J. Brubaker, The Aids Epidemic (Dec. 1985.) Dr. Slaff is a medical investigator for the National Institutes of Health.

resulted. Today, AIDS is properly seen as simply the terminal phase of an infection by a virus which has been variously termed human T-lymphotropic virus type III (HTLV-III), lymphadenopathy-associated virus (LAV), or AIDS-associated retrovirus (ARV). For simplicity, it will be referred to here as the AIDS virus. After a person is infected with the AIDS virus, it enters certain blood cells which are vital to the immune system (called helper T lymphocytes) and multiplies there. Although brief influenza-like symptoms are often experienced, this first stage of an AIDS virus infection is commonly referred to as the "asymptomatic carrier state."[5]

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[5]Address by Dr. A. Fauci, Director,

From the standpoint of epidemiological concern, persons who are in the asymptomatic carrier state are of far greater importance than persons with AIDS, since (1) people in the former group are approximately 200 times as numerous, (2) their blood tends to contain greater concentrations of virus, and (3) being asymptomatic, they are more likely to be unaware of their infection and more vigorous in the contagion of their virus to others.

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[5] (cont.d) National Institute of Allergy and Infectious Diseases, National Institutes of Health before the Institute of Medicine of the National Academy of Sciences, Oct. 16, 1985.

The diagnosis of persons in the asymptomatic carrier state has been greatly facilitated recently by the development of two blood antibody tests. While it is common for the popular press to report that persons whose blood produces a positive response in both tests have been "exposed" to the AIDS virus, largely to reduce the consequent state of alarm, the medical community accepts such seropositivity as presumptive evidence of current infection and infectivity.[6] Live virus can be cultured from the blood of about 60

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[6] C. Marwick, Blood Banks Give HTLV-III Test Positive Appraisal at Five Months, 254 Journal of the American Medical Association 1981 (Oct. 4, 1985).

percent of seropositive individuals on the first try, and more can be cultured on repeated attempts. The AIDS virus can incorporate itself into the genetic material of the cells and remain latent there for varying and unknown periods, and free virus cannot be cultured at all times from some infected individuals.

The second phase of AIDS virus illness used to be called pre-AIDS or lesser AIDS, but since the prognosis for progression to full-blown AIDS is unknown, today the description "AIDS-related complex" (ARC) is commonly preferred. Under the definition adopted for surveillance purposes by the Centers for Disease Control (CDC), ARC is to be used for

patients with non-lethal symptoms of an AIDS virus infection, including persistent fever, lymphadenopathy (enlarged lymph nodes), diarrhea, weight loss, fatigue, and night sweats.

Under the CDC definition, full-blown AIDS is a diagnosis reserved for persons with additional diseases, including Kaposi's sarcoma (a previously-rare type of cancer), pneumocystis carinii pneumonia (a previously-unusual pneumonia caused by a protozoa), and primary lymphoma (lymphoid cancer) of the central nervous system.[7] While AIDS is

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[7] J. Goedert and W. Blattner, The Epidemiology of AIDS and Related Conditions, 2, in V DeVita, Jr., et al, AIDS, supra, note 4.

sometimes popularly thought of as only itself a blood disease, the AIDS virus (in addition to secondary invading agents) causes devastation to the brains of a substantial percentage of patients.[8] Indeed, it has been observed that if a successful therapy is developed to eliminate the virus in the blood and restore the immune system, we may be faced with a large population of demented patients, whose central nervous systems have been gravely damaged by the virus, and who would not be subject to effective medication even if it were developed,

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[8]Grim New Ravage of AIDS: Brain Damage, New York Times, Oct. 15, 15 C1.

because of the blood-brain barrier.[9]

Estimates of the number of people in the United States who have been infected with the AIDS virus vary between 500,000 and 3,000,000. A very recent effort reported in the New England Journal of Medicine[10] put the figure at about 1,765,000. A Public Health Service source unofficially estimated that this number was currently increasing by perhaps 1000 to 2000 persons per day.[11]

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[9]Address by Dr. R. Johnson, Eisenhower Prof. of Neurology, Johns Hopkins University, before the Institute of Medicine of the National Academy of Sciences, Oct. 16, 1985.

[10]Vol. 313, p. 1352, Nov. 21 1985.

[11]New York Times Oct. 1, 1985 at C1, col. 1.

The number of persons whose disease progresses from the asymptomatic carrier state to full AIDS is estimated at 5 to 20 percent within five years. It is estimated that an additional 25 percent will develop ARC within the same period.[12] (Projections beyond five years cannot now be made.) The number of persons with ARC whose illness will subsequently progress to full AIDS is unknown, but is assumed to be substantial. Slaff and Brubaker estimate that by the end of the decade American will have more than 250,000 full-AIDS patients with more than $35 billion in direct medical costs.[13]

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[12]See Slaff and Brubaker, supra, note 4 at 48.

[13]Id. at 89.

Heartbreaking other costs are also endured. People with antibody positivity are probably infected for life. This is the experience with other similar viruses. Women who are infected are advised by the CDC to "postpone" pregnancy. (Washington Post, Dec. 6, 1985, p. A.3) The danger of infection of babies is unquantified but high. Men who are seropositive risk both the infection of their sexual partners and their offspring. Many seropositive individuals will doubtlessly decide not to marry. For all, there is a danger that the infection will progress to ARC or full AIDS, an illness from which none has recovered. Indeed, at least half of

AIDS patients can be expected to die within 18 months of diagnosis and 80 percent within 36 months of diagnosis. (J. Goedert and Blattner, in V. Devita, Jr., op.cit. supra, note 4, at 11.) One researcher described AIDS as follows:

> "With other diseases you die very fast. This is just horrible, a dwindling of the healthy body. I've worked with miserable diseases, but none as miserable as this."[14]

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[14]Washington Post, Mar. 17, 1983, at A1.

C. The prognosis for an AIDS Virus Vaccine or for Effective Therapy in the Foreseeable Future is Poor.

As antibiotics and other traditional therapies are ineffective against viral diseases, medical hope rests heavily on the possibility of developing an effective vaccine. With the AIDS virus, this task is greatly complicated by the ability of the virus to mutate into varying forms (like influenza viruses), and it is likely that a vaccine which might be effective against some varieties of the virus would be ineffective against many others. Dr. J. Slaff and J. Brubaker

note that 18 variants have been isolated thus far and state:

> While denial and disbelief are understandable actions, the notion that medical science is on the verge of a breakthrough that will soon end this epidemic is dangerously delusional.
>
> The truth is that those closest to the problem do not expect an effective treatment program within the decade. Presently, an AIDS virus vaccine is inconceivable."[15]

D. The Means of the Spread of the AIDS Virus

Approximately three out of four American AIDS patients have been homosexual males.

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[15] Op. cit. supra note 4, at 6.

TABLE 1–2. Total Number of U.S. Cases of AIDS Reported to the Centers for Disease Control, as of October 29, 1984, by Risk Group, Age Group, and Sex

	ADULT/ADOLESCENT CASES					
	MALE		FEMALE		TOTAL	
RISK GROUPS*	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
Homosexually active men	4772	78	—	—	4772	73
Parenteral drug users	891	15	238	57	1129	17
Haitians	202	3	35	8	237	4
Hemophiliacs	45	1	0	0	45	1
Heterosexual contacts†	3	0	45	11	48	1
Recipients of blood or blood product transfusions	44	1	33	8	77	1
None of the above/other	171	3	70	17	241	4
Total	6128	100	421	100	6549	100
	PEDIATRIC CASES‡					
Parents with AIDS or at increased risk for AIDS	23	55	23	79	46	65
Hemophiliacs	4	10	0	0	4	6
Recipients of blood or blood products transfusions	10	24	2	7	12	17
None of the above/other	5	12	4	14	9	13
Total	42	100	29	100	71	100

*Risk groups listed are ordered hierarchically; cases with multiple characteristics are tabulated only in the group listed first.

†With a person with AIDS or at risk for AIDS

‡Includes patients under 13 years of age at time of diagnosis

[16] J. Goedert and W. Blattner; in DeVita, Op. cit. supra, note 4 at 7.

In the years since the table was prepared, the cases have more than doubled in number, but the relative distribution has remained constant. Haitians have been removed from the list as a separate group, since on closer evaluation it has been found that infected Hatians can be placed in other risk groups. (For example, due to poverty, many normally heterosexual male Haitians have served as homosexual prostitutes.)

The most "efficient" means of transfer of the AIDS virus infection (other than by blood transfusion) appears to be anal intercourse. The rectum, unlike the vagina, is relatively fragile, with many surface blood vessels and without natural

lubrication. The penis is also relatively exposed to infection in this situation.[17] Less efficient, though still classed as types of "unsafe sex." include fellatio, fisting (forcing the fist into the rectum), and cunnilingus.[18]

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[17]For the anatomy of AIDS virus vulnerability see J. Langone, AIDS in Discover (Dec., 1985) 28, at 40.)

[18]See J. Goedert and W. Blattner, The Epidemiology of Aids and Related Conditions in DeVita, op. cit. supra, note 4, at 17; J. Slaff and J. Brubaker, op. cit. supra, note 4, at 96. There is no clear evidence as to whether all body fluids contain the virus, but it has thus far been cultured from blood, semen and saliva, and may be present in vaginal secretion and feces. N. Hennessey, "AIDS -- What the Family Physician Needs to Know" in Medical Aspects of Human Sexuality, Vol. 19, No. 9 (Sep. 85), at 22.

E. Other Diseases are Similarly Disproportionately Spread by Sodomy.

In addition to AIDS virus infection and the multitude of opportunistic infections and tumors which appear in immunocompromised patients, a number of other diseases appear disproportionately in active male homosexual populations. From 1965 to 1975, the ratio of male to female cases of syphilis in the U.S. rose from 1.6 to 1.0 to 2.5 to 1.0 In many large cities more than half of all infectious syphilis occurs in male homosexuality. 2 Cecil, Textbook of Medicine 1575 (16th ed, 1982). Gonococcal infections

of the pharynx and rectum are also common in homosexual males. Id. at 1568. Hepatitis B (formerly called serum hepatitis), has an annual attack rate on homosexuals of between 10 and 15 percent. Hepatitis B virus infections result in a significant morbidity and mortality for the active disease, and many become carriers with frequent progression to cirrhosis of the liver and primary liver cancer.[19]

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[19]Centers for Disease Control, Morbidity and Mortality Weekly Report, Vol. 34/No. 22 (1985) quoted in JAMA, July 5, 1985 at 29; J. Langone, AIDS, in Discover, 28 at 42 (Dec. 1985).

F. Recognizing a Constitutional Right to Commit Sodomy Would Both Encourage Behavior with a High Medical Risk and Compound the Difficulty of Adopting Control Strategies to Reduce the Rates of Contagion of the AIDS Virus and Other Sexually Transmitted Diseases.

Deterring undesirable behavior is probably the principal purpose of the criminal law.[20] Yet deterrence is a highly complex subject. Partly it

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[20]F. Zimring and G. Hawkins, Deterrence, The Legal Threat In Crime Control xi (1973)

represents a threat of apprehension and punishment of the individual facing a decision with respect to violation of legally-prescribed norms. Of likely greater importance in the present context is the educative function of criminal law. In responding to the current public health crisis, a state legislature should be free to conclude that there is a need for reinforcement of traditional sexual mores, not encouragement of "alternative life styles," whether homosexual or heterosexual. Law is an important teacher of right and wrong,[21] and

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[21] Id., at 77.

"[c]ultural attitudes toward adult sexual deviations undoubtedly influence their incidence." F. Redlich and D. Freedman, The Theory and Practice of Psychiatry 385 (1966). The plurality opinion of Justice Marshall in Powell v. Texas, 392 U.S. 514 (1968) noted:

> The long-stnding and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any group of people who are able to appreciate the consequences of their acts. (At 531.)

Dr. Karl Meninger observed with respect to a patient who protested that he could not avoid homosexual behavior: "Of course one thing he could do would be to live continently; there are

millions of heterosexually inclined people who are continent for one reason or another, and this should be no more difficult for a homosexually inclined individual."[22] (Of course there are many homosexually-inclined people who are continent as well.)

Incidentally, it should not be assumed that there is no medical risk even in the exchange of body fluids between seropositive individuals, since there is substantial evidence that repeated exposure to the virus (possibly because of the existence of

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[22] The Vital Balance 196 (1963) (with M. Mayman and P. Pruser).

its many variants) increases the risk of the infection progressing to full AIDS.[23] The use of condoms is often suggested, but their effectiveness in preventing viral infection is unproven.[24]

Creation of constitutional protection for sodomy would also make subsidiary strategies to reduce the spread of the virus more difficult. For example, closure of bathhouses and

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[23]Address by Dr. A. Fauci before the National Institute of Medicine, National Academy of Sciences, Oct. 16, 1985.

[24]J. Curran et al., The Epidemiology of AIDS: Current Status and Future Prospects 229 Science 1352 (Sept. 27, 1985).

sexually facilitating bars and parks has often been advocated, occasionally been ordered, but rarely been enforced. While voluntary behavior has reduced the patronage of such places in a number of cities, highly dangerous practices continue to take place in them.[25] If sodomy were declared to to be a fundamental constitutional right, measures to close

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[25]For a recent account of the continuation of unsafe behavior in a homosexual bathhouse in New York, see P. Weiss, Inside a Bathhouse, The New Republic (Dec. 2, 1985) at 12.

By one recent estimate, up to 20 percent of homosexuals still practice the riskiest sexual behavior, with multiple partners. Time, Aug. 12, 1985, p. 46.

facilities designed to facilitate sodomy would be met with the claim that they infringe upon that right. An example is provided by the New York decisions. In People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), decided six months before the first AIDS cases were reported in the United States, the New York Court of Appeals held that the state consensual sodomy prohibition was violative of the right to privacy, since "there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct." (Id., at 941, emphasis supplied.) In People v.

Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62 (Feb., 1983) the same court struck down a statute prohibiting loitering in a public place for the purpose of engaging in or soliciting deviate sexual intercourse, relying on Onofre, without rethinking its rationale in the light of the then beginning medical crisis.

At the time of the adoption of the Model Penal Code by the American Law Institute, in 1962, after extended controversy it was decided that the continuation of proscriptions of sodomy between consenting adults in private would not be recommended, even though it was then illegal in all American states; it was not thought to be dangerous to the participants or to

others. (Model Penal Code and Commentaries, Official Draft and Revised Comments, 1980, Part II, Art. 230, pp. 369-371. At the same time, the American Law Institute recommended the prohibition against prostitution be retained because of the danger of the spread of veneral disease.[26] Since that time, we have experienced a new and lethal venereal disease which is primarily spread by sodomy. Obviously, criminal proscriptions are no panacea, especially with respect to truly private conduct. Yet they can help even there, at least on the margin, and

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[26] Id., Art. 251, p. 458.

they can help additionally in settings such as sexual activity-facilitating bathhouses and bars where the risk of spread of infection is at its highest. Other measures may have to be considered as well to encourage behavioral change, because in the absence of effective vaccines or therapy, neither of which is likely for the foreseeable future, only behavioral change will help prevent the great majority of future infections.[27]

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[27]Address of Dr. J. Curran, Chief, AIDS Branch, Division of Viral Diseases, CDC before theInstitute of Medicine, National Academy of Sciences, October 16, 1985.

The legal system must do what it can, for every case of AIDS prevented will save a human life.

G. Strict Scrutiny of Sodomy Statutes Represents an Inappropriate Standard of Review, Given the Intensity of the State's Interests.

Of course, it might be contended that the epidemiological concerns are premature in the present posture of this case, since the Court of Appeals only ruled that the sodomy statute implicated a fundamental right of Mr. Hardwick, remanding the case "for

trial,[28] at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest."[29]

The strict scrutiny found appropriate by the Court of Appeals would create a severe presumption of unconstitutionality of state sodomy legislation. Professor Gerald Gunther

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[28]Presumably the court meant to refer only to further consideration by the trial court, as the determination would be one of legislative fact, not adjudicative fact which would require support by formal proof at trial.

[29]760 F.2d at 1213.

may have only slightly overstated the point when he referred to scrutiny which was "strict" in theory and fatal fact.[30] There is ample authority for the proposition that the nature of the state's interest affects the level of scrutiny which is appropriate. See, e.g., Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwich, 441 U.S. 68 (1979). We are faced with a public health catastrophe of historic proportions. The states must be able to act with incomplete information, for

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[30] Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, at 8 (1972).

the alternative is inaction, and inaction itself poses grave peril. To ask that legislatures act with the surgical precision which would be required by the Court of Appeals is to seek the impossible and to state that the law is to be helpless while thousands continue to be infected and to die.

The present case is quite different from Roe v. Wade, 410 U.S. 113 (1973), in which the right of a woman to terminate her pregnancy was held to be fundamental. There the court noted that the risk to the life of a woman who undergoes an early abortion under modern medical techniques appears to be "as low as or lower than the rates for

normal childbirth."[31] The medical risk of sodomy, on the other hand, is extraordinary.

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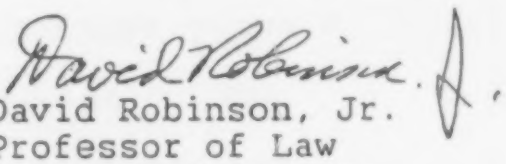
[31] Id., at 149.

CONCLUSION

For the reasons stated, it is urged that the decision of the court below be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I have served three true copies each, first class postage prepaid, this 18th day of December, 1985 to Laurence Tribe, Griswold Hall 307, Harvard Law School, Cambridge, Massachusetts 02138, attorney for respondents, and Michael, E. Hobbs, Senior Assistant Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334, Attorney for petitioner.

David Robinson, Jr.

Supreme Court, U.S.
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No. 85-140 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK AND
JOHN AND MARY DOE,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-140

MICHAEL J. BOWERS,
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v.

MICHAEL HARDWICK and
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Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THIS CASE

Concerned Women for America is a national, non-profit membership organization with approximately 500,000 members. At its annual convention held in Washington, D.C., on September 14-15, 1984, it adopted the following resolution:

> We oppose any laws designed to grant special legal protection to those who engage in homosexuality. Such laws are an affront to public morality and our dedication to family life.

Concerned Women for America supports the position of the petitioner, the Attorney General of Georgia. The petitioner argues that states have the constitutional power to outlaw homosexual activity. Homosexual activity is not protected under the Constitution. Concerned Women for America urges this Court to reverse the Eleventh Circuit Court of Appeals decision in *Hardwick* v. *Bowers*, 760 F.2d 1202 (11th Cir. 1985).

I.

The States Have Always Had The Constitutional Power To Criminalize Homosexual Activity

Historically, states have exercised with little challenge the constitutional power to regulate and outlaw sodomy. State legislatures throughout the centuries of American history have criminalized homosexual activity, with little or no question (until recent times) that criminal sodomy laws violated the Constitution. The Framers of the Constitution and its amendments did not intend to eliminate the states' power to regulate homosexuality, "a form of behavior never before protected, and indeed, traditionally condemned," by American society, *Dronenburg* v. *Zech*, 741 F.2d 1388, 1396, (D.C. Cir. 1984).

Homosexuals argue that the constitutional right of privacy cloaks their actions with a zone of privacy, shielding them from state regulation. Therefore, the homosexuals claim, the state cannot outlaw sodomy. This right of privacy argument has no historical merit or foundation in the Constitution.

The right of privacy anchors at an elusive harbor in the Constitution. This Court has said that several parts of the Constitution suggest a right of privacy, the First, Third, Fourth, Fifth, and Ninth Amendments, the penumbras of the Bill of Rights, and the concept of liberty guaranteed by the Fourteenth Amendment, *Roe* v. *Wade*, 410 U.S. 113, 152 (1973).

Whatever the limits of the right of privacy, historically, no part of the Constitution grants a "right to sodomy." States have passed criminal sodomy laws before and after ratification of the Bill of Rights, the Fourteenth Amendment and, indeed, every portion of the Constitution.

The historical case in favor of state criminal sodomy laws is overwhelming. All of the 13 original states had criminal sodomy laws, most of them punishing sodomy with death.[1] (Some of these states used the English term, "buggery" in their laws, rather than "sodomy"). None of these states repealed their criminal sodomy laws after passage of the Bill of Rights in 1791, and none of their state courts at that time declared their laws unconstitutional on a right of privacy basis.

The new states that entered the Union during the early and mid-1800's routinely passed criminal sodomy laws.[2] No court at that time declared these laws unconstitutional.

At the time of ratification of the Fourteenth Amendment in 1868, all but 5 of the 37 states in the Union had criminal sodomy laws. The five states that did not, Indiana, Iowa, Nebraska, Ohio and Vermont, all later

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[1] See text of state laws following in this brief.

[2] Id.

approved criminal sodomy laws.[3] No state legislature at that time repealed its sodomy law due to the Fourteenth Amendment, or had a state court declare it unconstitutional on a right of privacy basis.

Every state that entered the union after 1868 passed a criminal sodomy law. For most of American history, all states have had criminal sodomy laws.[4] The first state to repeal its criminal sodomy law occurred in 1962.[5] No state supreme court declared a criminal sodomy statute unconstitutional on a right of privacy basis until 1980,[6] which is almost 200 years after ratification of the Bill of Rights and 112 years after ratification of the 14th Amendment.

Until very recently, no court has seriously entertained the notion that criminal sodomy laws are unconstitutional. States have passed (or repealed) their criminal sodomy laws as they saw fit. Indeed, no historical evidence exists that the Framers of the Bill of Rights, the Fourteenth Amendment or any other portion of the Constitution intended to eliminate the states' power to regulate homosexual activity.

Bill Of Rights

We submit the texts of the criminal sodomy laws that were in effect in 1791, at the time the ten amendments in

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[3] Id.

[4] See following text of this brief, and *The Rights of Gay People*, American Civil Liberties Union, Boggan, Haft, Lister, Rupp and Stoddard, 1983, Bantam Books, pp. 131-166.

[5] 1961 Illinois Laws, p. 1983, § 11-2 (effective Jan. 1, 1962). Since that time, other states have repealed their criminal sodomy laws. At present, 25 states and the District of Columbia still retain criminal sodomy laws. See Appendix A for that list of states.

[6] See *People* v. *Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980) and *Commonwealth* v. *Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

the Bill of Rights were ratified, to enable the Court to ascertain the law as of that date.

Connecticut

The Public Statute Laws of the State of Connecticut, 1808 title LXVI (66), Chap. 1, § 2, p. 295 (this law was passed as a "capital law" by the General Court of Connecticut on Dec. 1, 1642, and was still in effect up to 1808):

> That if any man shall lie with mankind, as he lieth with womankind, both of them have committed abomination, they both shall be put to death; except it shall appear that one of the parties was forced, or under fifteen years of age; in which case the party forced, or under the age aforesaid, shall not be liable to suffer the said punishment.

Delaware

Laws of the State of Delaware, 1797, Chap. 22a, § 5, p. 67 (passed in 1719):

> That if any person or persons shall commit sodomy, or buggery, or rape or robbery, . . . he or they so offending, or committing any of the said crimes within this government, their counsellors, aiders, comforters and abettors, being convicted thereof, as above-said, shall suffer as felons, according to the tenor, direction, form and effect of the several statutes in such cases respectively made and provided in Great Britain; any act or law of this government to the contrary in any wise notwithstanding.

(Sodomy was punished by death under English law. See section on North Carolina).

Georgia

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law at the time the states

ratified the Bill of Rights. The Georgia Legislature in 1784 adopted the common law of England as the law of Georgia. The first Georgia sodomy statute passed in 1816, Lamar's of Georgia, 1810-1819, § 35, p. 571, read as follows:

> Sodomy and bestiality shall be punished by hard labour in the penitentiary, during the natural life or lives of person or persons convicted of these detestable crimes.

Maryland

Maryland had no criminal sodomy statute in 1791, but sodomy was a criminal offense at common law. The Declaration of Rights of Maryland, section 3, a portion of the Maryland State Constitution passed in 1776, said "that the inhabitants of Maryland are entitled to the common law of England. . . ." Sodomy was a crime at common law (see section on North Carolina).

In 1793, the Maryland Legislature passed a law allowing justices to pass judgment on free male persons, male servants or apprentices. The list of crimes includes sodomy, and refers to it as a common law offense, Maryland Laws, Thomas Sim Lee, Esq., Governor, Chap. LVII (57), Article 10. See also *Davis* v. *State*, 3 Har. & J. 154 (Md. 1810).

In 1809, the Maryland Legislature passed the following law outlawing sodomy, Maryland Laws, Chap. CXXXVIII (138), art. IV, § 8:

> Every person duly convicted of the crime of sodomy, shall be sentenced to undergo a similar confinement for a period not less than one year nor more than ten years, under the same conditions as are herein after directed.

Massachusetts

Perpetual Laws of the Commonwealth of Massachusetts, 1780-1789, p. 187, Act of March 3, 1785:

> That if any man shall lay with mankind as he layeth with a woman, or any man or woman shall have carnal copulation with any beast or brute creature, and be thereof duly convicted, the offender, in either of those cases, shall be adjudged guilty of felony, shall be sentenced to suffer the pains of death, and the beast shall be slain, and every part thereof burned. And be it further enacted by the authority aforesaid, that such order and form of process shall be had and used, in trial of such offenders, and such judgment given, and execution done, upon the offender, as in cases of murder.

New Hampshire

Laws of New Hampshire, 1805, p. 267 (The state enacted this criminal sodomy law February 8, 1791):

> That if any man shall carnally lie with a man, as a man carnally lieth with a woman, or if any man or woman shall have carnal copulation with any beast, or brute creature, and be thereof convicted, the offender in either of those cases before mentioned, shall suffer death, and the beast shall be slain and burned.

New Jersey

Sodomy was a crime at common law in New Jersey at the time the Bill of Rights were ratified. Five years later, New Jersey passed the following law:

Acts of the General Assembly, March 18, 1796, Chap. DC, § 7, p. 93:

> That sodomy, or the infamous crime against nature, committed with mankind or beast, shall be adjudged a high crime and misdemeanor, and be punished by

fine and solitary imprisonment at hard labour, for any term not exceeding twenty-one years.

New York

Laws of New York, Chap. 21, p. 391 (Passed February 14, 1787):

> That the detestable and abominable vice of buggery, committed with mankind, or beast, shall be from henceforth adjudged felony; and such order and form of process therein shall be used against the offenders, as in cases of felony at the common law; and that every person being thereof convicted, by verdict, confession, or outlawry, shall be hanged by the neck, until he or she shall be dead.

North Carolina

At the time of ratification of the Bill of Rights, North Carolina adopted the English statute of Henry VIII outlawing sodomy, 25 Henry VIII, chap. 6. This law was the basis of the English common law crime of "buggery" (sodomy):

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm, for the detestable and abominable vice of Buggery committed with mankind or beast: It may therefore please the King's Highness, with the assent of his Lords spiritual and temporal, and the Commons of this present Parliament assembled . . . That the same offense be from henceforth adjudged Felony . . . And that the offenders being hereof convict . . . shall suffer such pains of death and losses and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as Felons be accustomed to doe [sic] according to the order of the Common-laws of this Realm. And that no person offending in any such offense, shall be admitted to his Clergy, And that Justices of Peace shall

> have power and authority, within the limits of their Commissions and Jurisdictions, to hear and determine the said offense, as they do use to doe [sic] in cases of other Felonies . . .

In 1837, the North Carolina Legislature passed a criminal sodomy statute, North Carolina Revised Code, Chap. 34, § 6 (1837):

> Any person who shall commit the abominable and detestable crime against nature, not be named among Christians, with either mankind or beast, shall be adjudged guilty of a felony, and shall suffer death without the benefit of clergy.

Pennsylvania

The Statutes at Large of Pennsylvania, 1682-1801, vol. 13, (1682-1801), p. 511, Chap. MDXVI (1516), passed April 5, 1790:

> . . . That the pains and penalties hereinafter mentioned shall be inflicted upon the several offenders who shall from and after the passing of this act commit and be legally convicted of any of the offences hereinafter enumerated and specified, in lieu of the pains and penalties which by law have been heretofore inflicted; that is to say, every person convicted of robbery, burglary, *sodomy or buggery* or as accessory thereto before the fact shall forfeit to the commonwealth all and singular the lands and tenements, goods and chattels whereof he or she was seized or possessed at the time the crime was committed and at any time afterwards until conviction and be sentenced to undergo a servitude of any term or time at the discretion of the court passing the sentence not exceeding ten years in the public gaol or house of correction of the county or city in which the offense shall have been committed and be kept at such labor and fed and clothed in such manner as is herein after directed. [Emphasis added].

Rhode Island

The Public Laws of the State of Rhode Island and Providence Plantations, 1798, § 8, p. 586, "An Act to Reform the Penal Laws,"

> That every person who shall be convicted of sodomy, or of being accessary [sic] thereto before the fact, shall, for the first offence, [sic] be carried to the gallows in a cart, and set upon said gallows, for a space of time not exceeding four hours, and thence to the common gaol, there to be confined for a term not exceeding three years, and shall be grieviously fined at the direction of the Court; and for the second offence [sic] shall suffer death.

South Carolina

Public Laws of the State of South Carolina, 1790, p. 49:

The Punishment of the Vice of Buggery

> Forasmuch as there is not yet sufficient and condign [sic] Punishment appointed and limited by the due Course of the Laws of this Realm, for the detestable and abominable Vice of Buggery committed with Mankind or Beast: (2) It may therefore be enacted, That the same offence be from henceforth adjudged Felony, and such Order and Form of Process therein to be used against the Offenders as in Cases of Felony at the Common Law; (3) and that the Offenders being hereof convict [sic] by Verdict, Confession, or Outlawry, shall suffer such Pains of Death, and Losses and Penalties of their Goods, Chattels, Debts, Lands, Tenements and Hereditaments, as Felons be accustomed to do, according to the Order of the Common Laws of this Realm; (4) and that no Person offending in any such Offence, shall be admitted to his Clergy; (5) and that Justices of Peace shall have Power and Authority, within the Limits of their Commissions and Jurisdictions, to hear and determine

the said Offence, as they do use to do in Case of other Felonies.

Id. page 65:

An Act for the Punishment of the Vice of Buggery

Where in the Parliament begun at London the 3d Day of November in the 21st Year of the late King of most famous Memory, King Henry the Eighth, and after by Prorogation holden at Westminster in the 25th Year of the Reign of said late King, there was one Act and Statute made, entitled, An Act for the Punishment of the Vice of Buggery, whereby the said detestable Vice was made Felony, as in the said Estatute [sic] more and large it doth and may appear: (2) Forasmuch as the said Statute concerning the Punishment of said Crime and Offence of Buggery standeth at this present repealed and void by Virtue of the Statute of Repeal made in the 1st Year of the Reign of the late Queen Mary: Sithence which Repeal so had and made divers evil disposed Persons have been the more bold to commit the said most horrible and detestable Vice of Buggery aforesaid, to the high Displeasure of Almighty God

II. Be it enacted, That the said Statute before mentioned, made in the 25th Year of the said late King Henry the 8th, for the Punishment of the said detestable Vice of Buggery, and every Branch, Clause, Article and Sentence therein contained, shall from and after the 1st Day of June next coming be revived, and from thenceforce shall stand, remain, and be in full Force, Strength and Effect for every, in such Manner, Form and Condition, as the same Statute was at the Day of the Death of the said late King Henry the Eighth, the said Statute of Repeal made in the said 1st Year of the said late Queen Mary or any Words general or special therein contained, or any other Act or Acts, Thing or Things, to the contrary notwithstanding.

Virginia

Virginia passed a criminal sodomy statute in 1792, shortly after the ratification of the Bill of Rights. Before that time, Virginia had adopted the English common law, which made sodomy a crime punishable by death (see Hennings Statutes of Virginia, vol. 9, 1775-1778, Chap. V, § VI, p. 127, passed May 1776). The Virginia criminal sodomy statute passed in 1792 appears at Virginia Statutes at Large, 1835, p. 113 (Chap. 38, passed December 10, 1792):

> (1) That if any do commit the detestable and abominable vice of buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without the benefit of clergy.
>
> (2) This act shall commence in force from and after the passing thereof.

Fourteenth Amendment

We submit to this Court the texts of the criminal sodomy laws in effect in 1868, the year the Fourteenth Amendment was ratified. The 13 original states all retained their criminal sodomy laws, with some alterations in language. Here are the texts of laws in effect in the states that had entered the union between 1791 and 1868:

Alabama

Alabama Code, 1852, § 3235, p. 583:

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than two or more than ten years.

Arkansas

Statutes of Arkansas, 1858, chapter 51, Art. IV, § 5, p. 335: (passed in 1838):

> Every person convicted of sodomy, or buggery, shall be imprisoned in said jail and penitentiary house, for a period not less than five, nor more than 21 years.

California

Statutes 1850, Chap. 99, § 48, p. 99:

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the State Prison for a term not less than five years, and which may extend to life.

Florida

Florida Laws 1868, Chap. 1637, Subchap. 8, § 17, p. 98:

> Whoever commits the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State penitentiary not exceeding twenty years.

Illinois

Revised Statutes of 1844-45, Chap. 30, Div. 5, § 50, p. 158:

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and may extend to life.

Indiana

Indiana did not have a criminal sodomy law at the time of passage of the 14th Amendment, but passed the following law in 1881 (Revised Statutes of Indiana—1897, Chap. 5, art. 5, § 2118, p. 338):

> Whoever commits the abominable and detestable crime against nature, by having carnal knowledge of a man or beast; or who, being a male, carnally knows any man or any woman through the anus; and whoever entices, allures, instigates, or aids any person under the age of twenty-one years to commit masturbation or self-pollution—is guilty of sodomy, and, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen years nor less than two years.

Iowa

Iowa did not have a criminal sodomy law at the time of passage of the 14th Amendment, but later passed the following law in 1892, (Annotated Code of Iowa, 1897, § 4937, p. 1941, passed 24 General Assembly, Chap. 39):

> Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years nor less then one year.

Kansas

Art. 7, Chap. 31, § 249, General Statutes of 1868 (found at vol. 2, p. 340, Statutes of Kansas, 1897):

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by confinement and hard labor not exceeding ten years.

Kentucky

Revised Statutes of 1852, Chap. 28, Art. IV, § 11, p. 381:

> Whoever shall be convicted of the crime of sodomy or buggery with man or beast, he shall be confined in the penitentiary not less than two nor more than five years.

Louisiana

Revised Statutes of Louisiana, 1856, "Crimes and Offences," § 5, p. 136:

> Whoever shall be convicted of the detestable and abominable crime against nature, committed with mankind or beast, shall suffer imprisonment at hard labor for life.

See also *State* v. *Vicknair*, 52 La. Ann. 1921, 28 So. 273 (1900).

Maine

Revised Statutes of 1857, Chap. 124, § 3, p. 684:

> Whoever commits the crime against nature, with mankind or with a beast, shall be punished by imprisonment not less than one, nor more than ten years.

Michigan

Compiled Laws of 1857, § 5871, p. 1543:

> Every person who shall commit the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State prison not more than fifteen years.

Minnesota

Minnesota Statutes 1858, Chap. 96 § 13, p. 729:

> Every person who shall commit sodomy, or the crime against nature, either with mankind or any beast, shall be punished by imprisonment in the territorial [sic] prison, not more than five years, nor less than one year.

(Apparently, the Minnesota State Legislature repassed the criminal laws of the Minnesota Territory, and did not notice that the criminal sodomy statute made reference to the "territorial prison," when it should have referred to the "state prison." See Revised Statutes of the Territory of Minnesota, Chap. 107, § 13, p. 520).

Mississippi

Laws of 1857, Chap. 64, art. 238, § 52, p. 611:

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term not more than ten years.

Missouri

Revised Statutes 1855, Chap. 50, § 7, p. 624:

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by imprisonment in the penitentiary not less than ten years.

Nebraska

Nebraska had a criminal sodomy law while it was a territory, but not for a few years after it became a state. The Statutes of the Nebraska Territory of 1866 had a criminal sodomy statute at § 47, "Offenses Against Persons," p. 599. Nebraska had no criminal sodomy law at the time the states ratified the Fourteenth Amendment in 1868. The Nebraska State Legislature later passed such a law in 1875, using the exact language of the earlier territorial sodomy law. Compiled Statutes, 1881, § 245, p. 805, reads as follows:

> That the infamous crime against nature either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and my [sic, "may"] extend to life.

Nevada

The Compiled Laws of Nevada in Force from 1861-1900, § 4699, sec. 45, p. 915 (the law was approved November 26, 1861):

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the state prison for a term not less than five years and which may extend to life.

Ohio

Ohio did not have a criminal sodomy law in 1868, at the time of ratification of the Fourteenth Amendment. The Ohio Legislature later passed a criminal sodomy statute in 1885, Ohio Laws 1885, p. 241 (passed May 4, 1885):

> Sec. 1 That whoever shall have carnal copulation against nature, with another human being or with a beast, shall be deemed guilty of sodomy, and shall, on conviction thereof, be imprisoned in the penitentiary not more than twenty years.
>
> Sec. 2 This act shall take effect and be in force from and after its passage.

Oregon

Oregon Organic and General Laws, 1845-64, Chap. 48, § 639, p. 560, (passed October 19, 1864):

> If any person shall commit sodomy or the crime against nature, either with mankind or beast, such person, upon conviction thereof, shall be punished by

imprisonment in the penitentiary not less than one year, nor more than five years.

Tennessee

Code of Tennessee, 1858, § 4843, p. 868:

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five nor more than fifteen years.

Texas

Penal Code of the State of Texas, 1879, art. 342, p. 46 (passed on February 11, 1860):

> If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.

Vermont

Vermont had no criminal sodomy statute until 1937, although Vermont courts recognized sodomy as a crime at common law, which could be punished. See *State* v. *La Forrest*, 71 Vt. 311, 45 A. 225 (1899).

This is the text of the Vermont criminal sodomy statute passed in 1937, (Vermont Statutes of 1947, Chap. 370, § 8480, p. 1593):

> A person participating in the act of copulating the mouth of one person with the sexual organ of another shall be imprisoned in the state prison not less than one year nor more than five years.

West Virginia

Code of West Virginia—1870, Chap. 149, § 12, p. 694, passed in 1868:

> If any person shall commit the crime of buggery, either with mankind or with any brute animal, he shall be confined in the penitentiary not less than one nor more than five years.

Wisconsin

Revised Statutes of Wisconsin, 1858, Chap. 170, § 15, p. 975:

> Every person who shall commit sodomy, or the crime against nature, either with mankind or beast, shall be punished by imprisonment in the state prison, not more than five years nor less than one year.

After 1868

After 1868, 13 more states entered the union. All of them passed criminal sodomy laws.[7] The states are Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming. None of these states viewed the Bill of Rights or the Fourteenth Amendment as a restriction on their power to outlaw sodomy. None of the courts in these states declared their criminal sodomy laws unconstitutional.

CONCLUSION

The unanimous verdict of American history is that state legislatures have the constitutional power to criminalize sodomy. No historical evidence exists that the Framers of the Bill of Rights or the Fourteenth Amendment or any

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[7] op. cit., *ACLU*. See footnote 4.

other portion of the Constitution intended to protect homosexual behavior. The clear understanding and practice of the states for the whole of American history is that state legislatures have the constitutional power to regulate homosexuality as they see fit. No "right to sodomy" lurks in the texts or penumbras of the Constitution. The clear message of American legal history is that state-criminal sodomy laws are constitutional. The Eleventh Circuit should be reversed and the Georgia sodomy law upheld.[8]

Date: December 19, 1985

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[8] Our thanks to Kenneth Clark of McLean, Virginia, a law student at Catholic University in Washington, D.C., for his help on this brief.

APPENDIX

APPENDIX A

CURRENT CRIMINAL SODOMY LAWS

State	Statutory References	Classification
Alabama	13A-6-65	Class A Misd.
Arizona	13-1411	Class 3 Misd.
Arkansas	41-1813	Class A Misd.
District of Columbia	22-3502	Felony
Florida	800.02	2nd Degree Misd.
Georgia	16-6-2	Felony
Idaho	18-6605	Felony
Kansas	21-3505	Class B. Misd.
Kentucky	510.100	Class A Misd.
Louisiana	14.89	Felony
Maryland	27-553	Felony
	27-554	Felony
Massachusetts	272-34	Felony
Michigan	750.158	Felony
Minnesota	609.293	Misd.
Mississippi	97-29-59	Felony
Missouri	566.090	Class A Misd.
Montana	45-5-505	Misd.
Nevada	201.190	Felony
New York[1]	130.38	Class B Misd.

[1] Although the New York criminal sodomy law is still listed in the statute books, it was declared unconstitutional by the highest state court in New York in 1980, and the U.S. Supreme Court declined to review the case, *People* v. *Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 447, 415 N.E.2d 936 (1980), cert. denied 451 U.S. 987 (1981).

North Carolina	14-177	Class H Felony
Oklahoma	21-886	Felony
Pennsylvania[2]	18-3124	Misd. 2nd Degree
Rhode Island	11-10-1	Felony
South Carolina	16-15-120	Felony
Tennessee	39-2-612	Felony
Texas[3]	21.06	Felony
Utah	76-5-403	Class B Misd.
Virginia[4]	18.2-361	Class 6 Felony

Source: *Are "Gay Rights" Right? A Report on Homosexuality and the Law*, p. 89-90, by Roger Magnuson, Esq., for the Berean League of Minnesota, 2875 Snelling Ave. North, St. Paul, Minn. 55113, (612) 633-0654. This chart appears as Appendix C in the Berean League report, and was compiled by Jordan Lorence.

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[2] Although the Pennsylvania criminal sodomy statute is still listed in the statute books, it was declared unconstitutional by the Pennsylvania Supreme Court in 1980, *Commonwealth* v. *Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

[3] The Texas criminal sodomy law was declared unconstitutional by a federal district court in 1982, *Baker* v. *Wade*, 553 F.Supp. 1121 (N.D. Tex. 1982). But this decision was later overturned by the 5th Circuit Court of Appeals sitting en banc. The 5th Circuit affirmed the constitutionality of the Texas criminal sodomy statute, *Baker* v. *Wade*, 769 F.2d 289 (5th Cir. 1985).

[4] The Supreme Court summarily affirmed a lower federal court that upheld the constitutionality of the Virginia criminal sodomy statute, *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), affirmed 425 U.S. 901 (1976).

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Supreme Court of the United States

October Term, 1985

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

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ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

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JOHN AND MARY DOE,

Respondents.

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INTEREST OF AMICI CURIAE[1]

The Eleventh Circuit opinion in this case raises serious questions about the continued right of the States to legislate

[1]Counsel of record for all parties have consented to the filing of this brief and, pursuant to Rule 36, letters of consent have been filed with the Clerk.

regarding the health, safety, and morals of their citizens. The Rutherford Institute is concerned about the implications for our social environment and tradition of family values.

Amici curiae are non-profit religious corporations with a national office in Manassas, Virginia and state chapters in Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas, and Virginia. The Rutherford Institute undertakes to participate in significant cases relating to First Amendment religious freedom and the preservation of the traditional moral values of this society. Counsel for *amici curiae* have specialized in constitutional litigation in state and federal courts and have participated as counsel for *amici curiae* before this Court. The Rutherford Institute believes that the expertise of its counsel will be of assistance in this case.

SUMMARY OF ARGUMENT

The principal issue before this Court is whether the Georgia sodomy statute violates the constitutional right of privacy recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Court has previously held that in order for decisions and activities to be included in the right of privacy, they must be " 'fundamental' or 'implicit in the concept of ordered liberty.' " *Roe v. Wade,* 410 U.S. 113, 152 (1973) (cit. omitted). In *Griswold, Roe v. Wade,* and numerous other decisions, this Court has followed the principle that no right can be considered fundamental unless it is rooted in the history and traditions of our society and is basic to our civil and political institutions.

The right of privacy has been carefully limited by this Court to decisions and activities relating to marriage, childbearing, and family. The right has been extended to these areas because they are basic to our civil and political institutions and, in our society, have historically and traditionally been considered beyond the proper scope of government regulations.

The practice of sodomy, even of a consensual and private nature, should not be cloaked with the constitutional right of privacy. The pursuit of such activity cannot be considered a fundamental right because it is not basic to our political and social institutions. A review of our history shows, moreover, that such practices have never been considered to be beyond the proper scope of government regulation. In fact, our institutions are built on a foundation not only different but totally inconsistent with such practices — monogamous marriage and the family unit. Moreover, our institutions would be eroded by the legitimization of sodomy. Therefore, this Court should refuse to extend the right of privacy to sodomy.

Should the Court recognize sodomy as protected by the right of privacy, all private consensual activities — including incest, polygamy, bestiality, etc. — would appear to be legalized. In addition, a rejection of the historical analysis previously employed by the Court to identify fundamental rights would eliminate all restraint in interpretation of the Fourteenth Amendment.

No equal protection issues are presented. If the Court addresses such issues, it should conclude that the Georgia statute is subject to review only under the rational basis test. The statute satisfies this text because it is rationally related to the State's legitimate interest in protecting and preserving morality.

ARGUMENT

I. INTRODUCTION

In this case, the Court is presented with "the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey v. Population Services International*, 431 U.S. 678, 688 n.5 (1977). The Eleventh Circuit has held that private consensual sodomy is protected

by the constitutional right of privacy. Based on this holding, the court concluded that the Georgia sodomy statute[2] can be upheld only if it is demonstrated that "the sodomy statute is a properly restrained method of safeguarding [the State's] interests." *Harwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985).

Amici curiae undertake to show that the right of privacy as developed in this Court's previous decisions provides no protection to the practice of sodomy. Because the Eleventh Circuit based its decision on the constitutional right of privacy, other constitutional issues — such as the equal protection claim — will not be discussed in detail. Although the general term "sodomy" will be used in this brief, it should be taken as referring to homosexual sodomy inasmuch as the constitutionality of the Georgia statute only as it applies to homosexual sodomy is before the Court. Both the district court and the Eleventh Circuit held that the married plaintiffs lacked standing. As a result only the claims of plaintiff Hardwick, an avowed homosexual who does not assert the rights of any heterosexual or married persons, are before the Court.

There have been a number of recent decisions on the consistency of sodomy statutes with the constitutional right of privacy. In *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D.Va. 1975), *aff'd*, 425 U.S. 901 (1976), privacy, due process, and freedom of expression attacks on the Virginia sodomy statute were rejected. Two federal courts of appeals have recently reached results consistent with *Doe v. Commonwealth's Attorney*. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir.) (en banc), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985) (uphold-

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[2]The operative language of the Georgia statute provides: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Off. Code Ga. Ann. § 16-6-2.

ing Texas sodomy statute); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir.), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) (upholding military discharge of homosexual). In both cases, the courts refused to recognized private homosexual conduct as coming within the constitutional right of privacy. The courts also rejected equal protection challenges. A final decision in this area is *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981), in which the New York Court of Appeals struck down the sodomy statute of that state on privacy and equal protection grounds.

II. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has previously recognized that there are certain fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. In the words of Mr. Justice Cardozo, speaking for the Court, due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. State of Connecticut,* 302 U.S. 319, 325 (1937). *See Rochin v. People of California,* 342 U.S. 165, 169 (1952) (quoting *Snyder* and *Palko*). When such rights are restricted by state action, a necessary relationship between the action and a compelling state interest is required in order for the action to be upheld. *Griswold,* 381 U.S. at 497.

In its decisions dealing with the right of privacy, which is applied to the states through the Fourteenth Amendment, this Court has been careful to limit the scope of the right to matters which can truly be characterized as fundamental. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court said that "only

personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152 (cit. omitted). In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), the Court quoted this language from *Roe v. Wade* in holding that the right of privacy does not protect access by consenting adults to obscene materials outside the home. The Court said: "Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accomodation." *Id.* at 65-66. Under this analysis, it is not sufficient to find the right of privacy itself fundamental, but in addition all subsidiary rights protected under the right of privacy must themselves be fundamental.

In order for any right to be considered fundamental and, therefore eligible for protection under the privacy guarantee, it must be rooted in the history of our society and be basic to our civil and political institutions. Two older decisions which contribute to this principle are *Palko* and *Meyer v. Nebraska,* 262 U.S. 390 (1923). In *Palko,* the Court suggested that a search for rights protected through the Fourteenth Amendment should focus on " 'the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " *Palko,* 302 U.S. at 328. Moreover, in *Meyer* the Court suggested that "our institutions rest" upon certain fundamental rights which include the right of parents to control the education of their children. *Id.* at 400-02. More recently, in *Duncan v. Louisiana,* 391 U.S. 145 (1968), the Court addressed the question of fundamental rights in a criminal procedure context. In concluding that the right to jury trial is fundamental, the Court explored the historical role of such trials in the "Anglo-American regime of ordered liberty." *Id.* at 149 n.14.

In *Griswold,* the Court formally announced the right of

privacy. The Court held that a Connecticut statute which forbade the use of contraceptives violated the constitutional right of privacy of married persons. The Court located this right in certain "penumbras" of the First, Fourth, Fifth, and Ninth Amendments to the Constitution. 381 U.S. at 484. Since *Griswold*, the Court has made it clear that it regards the right of privacy as "founded in the Fourteenth Amendment's concept of personal liberty." *Roe v. Wade*, 410 U.S. at 153. In concluding that this right of privacy was violated by the Connecticut statute, the Court emphasized that the appellants had given information concerning contraception to married persons. *Griswold*, 381 U.S. at 480. The Court stated:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

Id. at 486. In a concurring opinion, Justices Goldberg, Brennan, and Chief Justice Warren insisted that fundamental rights must be derived from the " 'traditions and [collective] conscience of our people.' " *Id.* at 493 (cit. omitted). They went on to reemphasize the basic position of "the rights to marital privacy and to marry and raise a family" in our society and that the marriage and family relationship are "as old and fundamental as our entire civilization." *Id.* at 495-496.

In *Roe v. Wade*, the Court again committed itself to historical analysis in determining what rights are fundamental and therefore protected by the right of privacy. After an extensive survey of the medical and legal history of abortion, the Court concluded that restrictive criminal abortion laws were "of relatively recent vintage." *Id.* at 129. In concluding that a woman's right to terminate her pregnancy should be encompassed in the right of privacy, the Court placed particular reliance upon its conclusion

that Anglo-American law had generally treated abortion with less severity than the state statutes then in force. The Court summarized: "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th Century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140. *See also id.* at 157-158, 165. An essential premise in the Court's reasoning was its conclusion regarding the legal and medical history of abortion. Justice Rehnquist's dissent was based at least in part on his view that the Court had misread this history. His conclusion was that "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Id. at 174 (Rehnquist J., dissenting) (cit. omitted).

In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (plurality opinion), the Court again indicated its obedience to history in the development of the right of privacy. The Court was faced with a city housing ordinance which had the effect of forbidding a grandmother from living in the same home with her son and two grandsons. In a plurality opinion authored by Justice Powell, it was concluded that the ordinance violated the Due Process Clause of the Fourteenth Amendment. The decision was based on an analysis of the importance of the family, both extended and nuclear, in American society. The Court said: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503. The plurality opinion emphasized that its "approach [was] grounded in history," *id.* at 503 n.12, and that "arbitary lines" need not be drawn when there is "careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " *Id.* at 502-03, *quoting Griswold,* 381 U.S. at 501 (Harlan, J., concurring). *See also Roberts v. United States Jaycees,* 104

S. Ct. 3244, 3250 (1984) (discussing historical importance and constitutional protection of the "personal affiliations that attend the creation and sustenance of a family.")

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court again emphasized the importance of history in deciding whether a privacy-related activity should be protected as a fundamental right. Based on "[t]he history and culture of Western civilization [which] reflect[s] a strong tradition of parental concern for the nurture and upbringing of their children," the Court held that, under the First Amendment guarantee of freedom of religion, Amish parents could not be convicted of vilolating the Wisconsin compulsorary school attendance statutes for failing to cause their children to attend formal high school until the age of sixteen. *Id.* at 232.

Without the constraint and guidance of history in discerning the fundamental rights protected against the states, judges would be free to legislate their own preferences at the expense of those of the American people as expressed through their elected representatives. In *Griswold,* itself, the Court recognized: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482. In *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan, in an oft-quoted dissenting opinion which adumbrated the right of privacy, expressed concern that fundamental rights analysis under the Due Process Clause of the Fourteenth Amendment contained potential for judicial abuse. However, Justice Harlan concluded that such abuse would be prevented by respect for "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke." *Id.* at 542, *quoted in Moore,* 431 U.S. at 501. Also, as pointed out above, the plurality in *Moore* repeatedly emphasized that "careful 'respect for the teachings of history' " is necessary in order for appropraite limits to be placed on substantive due process. 431 U.S. at 503.

III. THIS COURT HAS PREVIOUSLY LIMITED THE RIGHT OF PRIVACY TO ACTIVITIES AND DECISIONS RELATING TO MARRIAGE, CHILD BEARING, AND FAMILY BECAUSE THESE MATTERS HAVE HISTORICALLY AND TRADITIONALLY BEEN CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION.

In keeping with the historical analysis described above, the previous privacy decisions of the Court have carefully limited the scope of the right to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). In *Carey*, the Court listed these same areas along with supporting authorities. 431 U.S. at 684-85.

The list of protected decisions and activities given in these decisions can readily be simplified to three categories — marriage, child bearing, and family. Although *Griswold* was concerned with the use by married persons of contraceptives, 381 U.S. at 480, 485-6, the Court has since recognized the application of the right of privacy to activities and decisions of unmarried persons as they relate to child bearing or procreation. *Roe v. Wade*, 410 U.S. 113 (abortion) (plaintiff was an unmarried female); *Eisenstadt v. Baird, 405 U.S. 438*, 413 (1972) (decided under Equal Protection Clause) ("the decision to bear or beget a child"); *Carey*, 431 U.S. at 687 ("matters of child bearing"). It is enlightening that in *Carey* the Court summarized *Griswold*, as follows: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of child bearing from unjustified intrusion by the State." *Carey*, 431 U.S. at 687.

The areas of marriage, child bearing, and family which the Court has previously found to be encompassed by the constitutional right of privacy have historically and traditionally been free of government regulation. This " 'freedom of personal choice in matters of marriage and family life' " is beyond the reach of government regulation. *Akron v. Akron Center for Reproductive Health, Inc.*, 462

U.S. 416, 427 (1983), *quoting Roe v. Wade*, 410 U.S. at 169 (Stewart, J., concurring). The fundamental and basic role of marriage and family in our society has been recognized on many occasions by the Court. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), in which a Wisconsin statute which required certain persons to obtain a court order before they could marry was invalidated, the Court summarized its previous decisions in this area:

> [T]he right to marry is of fundamental importance for all individuals. Long ago in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.*, at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.*, at 211. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, establish a home, and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.*, at 399, and in *Skinner v. Oklahoma ex rel. Williamson*, [] 316 U.S. 535 (1942), marriage was described as "fundamental to the very existence and survival of the race," 316 U.S. at 541.

Id. at 384. The Court went on to conclude that the right to marry is one of the "matters of family life" protected by the right of privacy implicit in the Due Process Clause of the Fourteenth Amendment. In *Moore*, the Court also dwelled on the historical role of marriage and the family in America society: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 431 U.S. at 503 (plurality opinion). *See also Wisconsin v. Yoder*, 406 U.S. at 232-33; *Roberts*, 104 S. Ct. at 3250.

An early decision regarding the fundamental status of the family not discussed in the above-cited cases is *Reynolds v.*

United States, 98 U.S. (8 Otto) 145 (1878). In *Reynolds*, the Court affirmed a criminal conviction of a Mormon for practicing polygamy and rejected an argument that Congress' prohibition of polygamy violated the defendant's right to freely exercise his religion. After surveying the history of laws against polygamy and the history and role of monogamous marriage in America society, the Court concluded, "[I]t is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166. A few years later, the Court again addressed polygamy in *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). The Court said that "[t]he state has a perfect right to prohibit polygamy" because it is contrary to "the civilization which Christianity has produced in the Western World." *Id.* 49-50. In a recent Tenth Circuit decision, *Potter v. Murray City*, 760 F.2d 1065, 1069 (10th Cir. 1985), *Reynolds* was followed in rejecting a constitutional challenge under the right of privacy to the Utah prohibition of polygamy. In reaching its decision, the Court observed: "Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built." *Id.* at 1070.

It can be seen, therefore, that the right of privacy protects monogamous marriage, child bearing, and the family from governmental regulation because they have historically and traditionally been basic to our society. As a result, they are protected through the right of privacy implicit in the Due Process clause of the Fourteenth Amendment.

These principles must now be applied to the issue before the Court. The issue presented here is whether the private consensual practice of sodomy has historically been free of government regulation and whether sodomy is so basic to our civil and political institutions as to be implicit in the concept of ordered liberty. In other words, does the practice of sodomy play the same or a similar role to that served by

monogamous marriage and family life, which are fundamental to our society, *see Zablocki*, 434 U.S. at 383-87, and which the right of privacy is designed to protect? As the following historical survey demonstrates, this question can only be answered in the negative.

IV. TRADITIONALLY AND HISTORICALLY WESTERN SOCIETY HAS CONSIDERED THE PRACTICE OF SODOMY, EVEN OF A CONSENSUAL AND PRIVATE NATURE, AS WITHIN THE PROPER SCOPE OF GOVERNMENT REGULATION.

Laws forbidding the practice of sodomy, of which the Georgia statute is an example, have a long history in Western society. American laws against such practices can be traced back to the Judeo-Christian Scriptures, Roman law, the teachings of the Christian Church, and early English common and statutory law.

The Jewish and Christian Scriptures unequivocably condemn homosexual sodomy. Prior to the Mosaic Law, the cities of Sodom and Gomorrah were condemned at least in part because of the prevalance of homosexual practices. Genesis 18:16-19:29. *See also* Jude 7. Under the Mosiac Law, it was a capital offense for a man to lay with a male as with a female. Leviticus 18:22; 20:13. In the New Testament, the Apostle Paul condemned homosexual activities in Romans 1:26-27;[3] I Corinthians 6:9-10; and I Timothy 1:8-10.

The Christian Church has followed the teachings of Scripture in condemning homosexual practices. All of the early church Fathers who spoke on the subject condemned the practice. These included Tertullian, John Chrysostom, Augustine, and Clement of Alexandria. *See* D. Bailey,

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[3]In this passage, Paul uses the phrase "against nature" which was later used in the common law of England and found its way into the statutes of many American states. This phrase was also used by Plato in a passage criticizing homosexual relations. Plato, *Laws*, 8. 841. d.

Homosexuality and the Western Christian Tradition, 82-85 (1955 & photo. reprint 1975). In addition, numerous Christian Councils and Penitentials have condemned the practice of homosexuality. *Id.* at 86-110. During the medieval period, many Christian scholars and church officials also condemned homosexual practices. *Id.* at 110-20. Most notable was St. Thomas Aquinas. *Summa Theologica*, II-II, Q. cliii, cliv., *cited in* Bailey, *supra,* at 115-19. Even today most Christian churches continue to regard the practice of homosexuality as sin.

Ancient Greek and Roman attitudes should also be mentioned. In ancient Greece, pederasty was commonly practiced and homosexual love sometimes idealized. See R. Flaceliere, *Love in Ancient Greece* (J. Cleugh trans. 1962). However, there is no evidence that homosexuality met with general social approval. *Id.* at 62-63. In fact, the poet Aristophanes ridiculed homosexuals in his comedies.

Roman law is particularly important because of its influence on English law. An early law was the *Lex Scantinia.* Bailey, *supra,* at 64-66. Eventually, the Christian emperors promulgated laws against sodomy. Of particular importance were Justinian's laws promulgated in 528 and 544. *See Bailey, supra,* at 70-81. As one authority says, "Justinian through his *Novellae* and codification of the law, played a considerable part in determining the Western Christian attitude towards homosexual practices. . . ." Bailey, *supra,* at 81.

English common and statutory law have historically condemned the practice of sodomy. Around the end of the 13th Century, two complications, *Britton* and *Fleta*, described sodomy as a capital offense. *See* 3 W. Russell, *A Treatise on Crimes and Misdemeanors* 698 (1865 ed.) (1st ed. 1819); Bailey, *supra,* at 145-46. In 1533, an important statute was enacted making sodomy a felony and transferring authority over such cases from the ecclesiastical courts to secular tribunals.[4] Other statutes were enacted in 1548,

[4]25 Hen. 8, c. 6.

1563, 1828, 1861, and 1886.[5] In the third part of his *Institutes,* Sir Edward Coke stated that sodomy was "against the ordinance of the Creator and order of nature." He also stated that the method of execution should be by hanging. 3 E. Coke, *Institutes* 58 (1644). Later, Sir William Blackstone discussed the elements of and method of execution for the "crime against nature" which he characterized as "of a still deeper malignity than rape" 4 W. Blackstone, *Commentaries* 215-16.

It is not surprising then that the American colonies and states, in addition to the recognition of sodomy as a common law crime, enacted their own prohibitions of sodomy. Many American jurisdictions have even used the common law description "crime against nature" or "buggery." *See* T. Calvani, *Homosexuality and the Law —An Overview,* 17 N.Y.L.F. 273, 280-87 (1971). Because in the case before the Court, the contention is made that the practice of sodomy should be protected through the Fourteenth Amendment, it is particularly significant to consider American statutes which were in force in 1868, when the Fourteenth Amendment was adopted. The existence of state statutes at and prior to that time indicates that the Fourteenth Amendment was not intended to remove the power of the states to prohibit sodomy. In 1868, it appears that at least 34 of the 37 states in the Union, in addition to several territories, had at some point enacted sodomy statutes. *See* Appendix A. Note that the enactment of such laws shortly after the adoption of the Amendment also supports such an inference. It is unnecessary, however, to include all statutes enacted or reenacted after 1868 because the fact, as discussed below, that all American states still had such statutes in force in 1961 shows that these statutes have continuously been on the books.

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[5] *See,* 2, 3 Edw. 6, c. 92, Eliz. 1, c. 17; 9 Geo. 4, c. 31; 24 & 25 Vict. c. 100 (removing death penalty); 48 & 49 Vict. c. 69. *See* Bailey, *supra,* at 147-52. In 1967, English laws against consensual sodomy were repealed.

The existence of sodomy laws at the time of the adoption of the Fourteenth Amendment is significant because this Court has used a similar historical analysis, in other contexts, in order to determine the meaning of a constitutional provision. For example, in *Roth v. United States*, 354 U.S. 476 (1957), the Court reviewed various state laws against libel, blasphemy, and profanity which were in force at the time of the adoption of the First Amendment. The Court concluded: "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 482. The Court then cited several late 18th century and early 19th century statutes and cases concerning obscenity. *Id.* at 483 n.13. The materials cited by the Court to support the proposition that obscenity was not intended to be protected speech within the meaning of the First Amendment are certainly less unanimous and less impressive than the above-cited historical materials regarding the regulation of sodomy. Many other examples of the use of the historical method to determine the meaning of the Constitution could be cited. *E.g., Payton v. New York*, 445 U.S. 573 (1980) (concerning the Fourth Amendment); *Reynolds*, 98 U.S. (8 Otto) at 165 (regarding the practice of polygamy, the Court concluded: "In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.")

The scope of statutes prohibiting "crimes against nature" has been a matter of some controversy. It is generally thought that the common law prohibition was limited to copulation *per anum*. *See* Calvani, *supra*, at 276; J. Rizzo, *The Constitutionality of Sodomy Statutes*, 45 Fordham L. Rev. 553, 556-57 (1976). Many American jurisdictions have, however, construed the common law language of their sodomy statutes to include copulation *per os*. *See* Calvani, *supra*, at 276-77, 280-87. Rizzo, *supra*, at 556-57.

This Court has in the past upheld convictions for copulation *per os* under sodomy statutes which employ the common law "crime against nature" formulation. *Rose v. Locke*, 423 U.S. 48 (1975); *Wainwright v. Stone*, 414 U.S. 21 (1973).[6]

It appears that until 1961 all American states had criminal statutes forbidding the practice of sodomy, even of a private and consensual nature. *See* R. Slovenko, *Sexual Behvaior and the Law* 83 (1965). However, a decriminalization movement began in 1961 when Illinois made a statutory change removing penalities from the consensual and private practice of homosexual relations. *See* Calvani, *supra*, at 278; Slovenko, *Sexual Behavior and the Law*, supra, at 83. The next state to decriminalize private consensual homosexual activity was Connecticut in 1971. *See* Calvani, *supra*, at 278.

The decriminalization movement has gained considerable monmentun since the change in Illinois law in 1961. At present, it appears that 25 states and the District of Columbia still have in force criminal statutes forbidding private consensual sodomy. *See* Appendix B. The statutes of the remaining states have been repealed or, in a few cases, struck down by state courts. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1285 (1985).

The conclusions to be drawn from this discussion of history are obvious. American and Western society in general have historically and traditionally forbidden through criminal law the practice of sodomy. From the very outset of our society, criminal law has regulated even private consensual sodomy. Prior to the recent decriminalization movement, there has never been a time when the practice of private consensual sodomy has been considered beyond the

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[6]In the same cases, the Court rejected vagueness attacks on the common law language "crime against nature."

proper scope of government regulation. As the privacy decisions of this Court establish, in our society various "zones of privacy" have historically and traditionally been considered fundamental and beyond government reach. *Roe v. Wade,* 410 U.S. at 152. However, the practice of sodomy, even in a private and consensual setting has never been considered as coming within such a "zone of privacy."

The conclusion that the history and traditions of this Nation do not support a right to the private consensual practice of sodomy was also reached by Judge Gabrielli of the New York Court of Appeals in his dissenting opinion in *Onofre.* He said:

> Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of rape [cits. omitted]. Indeed, as early as 1553, during the reign of Henry VIII, England enacted statutes prohibiting sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various states. Thus, although some may take offense at the persistence of the proscriptions against consensual sodomy in our modern law, the fact remains that *western man has never been free to pursue his own choice of sexual gratification without fear of State interference. Consequently, it simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clause of the Fifth and Fourteenth Amendments.*

415 N.E.2d at 949 (emphasis added). *See also Baker, v. Wade,* 769 F.2d at 292 (observing "the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries").

On a number of occasions, this Court has recognized that in our society homosexual conduct is considered to be

perverse and deviant.[7] This reinforces the conclusion that historically and traditionally the practice of sodomy has not been recognized to be within any protected zone of privacy. In *Boutilier v. Immigration & Naturalization Service,* 387 U.S. 118 (1967), the Court construed language of the Immigration and Nationality Act barring "[a]liens afflicted with psychopathic personality" to include "all homosexuals and other sex perverts." *Id.* at 122. Beginning in *Mishkin v. State of New York,* 383 U.S. 502 (1966), the Court has held in a number of obscenity decisions that homosexuals are "a clearly defined deviant sexual group" and that the prurient appeal of material distributed to them may be "satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." *Id.* at 508. *See also id.* at 509. In subsequent cases, the Court has not wavered from this position. *Pinkus v. United States,* 436 U.S. 293, 302 (1978), *rev'g on other grounds,* 551 F.2d 1155, 1158-59 (9th Cir. 1977); *Hamling v. United States,* 418 U.S. 87, 92-93, 127-30 (1974).

V. BECAUSE THE PRACTICE OF SODOMY, EVEN OF A CONSENSUAL AND PRIVATE NATURE, HAS NEVER HISTORICALLY OR TRADITIONALLY BEEN CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, IT CANNOT BE CONSIDERED A FUNDAMENTAL RIGHT APPROPRIATE FOR PROTECTION BY THE RIGHT OF PRIVACY.

Because there has been no historical or traditional zone

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[7]In 1974, the American Psychiatric Association (APA) eliminated the general category of homosexuality from its Diagnostic and Statistical Manual of Mental Disorders and replaced it with a category called "sexual orientation disturbance" which applies only to "ego-dystonic" homosexuality. The vote by APA members, which was hotly contested, was prompted by demonstrations and disruptions staged by homosexuals. The change in nomenclature has been severely criticized, even by members of the Association. R. Slovenko, *The Homosexual and Society, a Historical Perspective,* 10 U. Dayton L. Rev. 445, 449-51 (1985).

of privacy surrounding the practice of sodomy, it cannot be considered a fundamental right appropriate for application against the states through the Fourteenth Amendment. As demonstrated above, the requisite historical basis for a traditional right is lacking with respect to sodomy. The conclusion is irresistable, therefore, that the practice of private consensual sodomy cannot be regarded as a fundamental right protected through the Fourteenth Amendment.

In *Rose v. Locke*, 423 U.S. 48 (1975), this Court specifically held that the Tennessee sodomy statute did not implicate fundamental rights. In upholding a conviction under the statute against a constitutional attack, the Court said: "This is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny [cit. omitted]." *Id.* at 50 n.3. This holding that sodomy statutes do not implicate fundamental rights is consistent with the Court's acknowledgment in *Roe v. Wade* that is has never recognized "an unlimited right to do with one's body as one pleases." 410 U.S. at 154.

The conclusion that sodomy statutes do not implicate fundamental rights is reinforced by comments of some of the members of this Court in previous decisions. In his well known dissent in *Poe v. Ullman*, which foreshadowed the development of the right of privacy, Justice Harlan specifically said that homosexual practices, even though "concealed in the home" were a proper matter of state concern and could be forbidden by the states. According to the Justice:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range or subjects

> with which every society in civilized time has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine must be built upon that basis.

367 U.S. at 545, 46. Note that Justice Harlan not only found that there is no fundamental right to the practice of homosexuality, but in fact concluded that there is a fundamental "pattern . . . deeply pressed into the substance of our social life" against such practices. Later in his dissenting opinion, the Justice repeated his position "that adultery, homosexuality, fornication, and incest . . . however privately practiced" are subject to state proscription. *Id.* at 552-53.

Other pertinent comments can be found in *Griswold, Zablocki,* and *Carey*. In *Griswold,* Justice Goldberg wrote an opinion in which chief Justice Warren and Justice Brennan joined. In this opinion, these Justices quoted a passage from Justice Harlan's dissenting opinion in *Poe v. Ullman,* that "[a]dultery, homosexuality and the like are sexual intimacies which the State forbids." *Griswold,* 381 U.S. at 499. This passage was quoted in support of the proposition that the Court's holding in *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." *Id.* at 498-99. In his concurring opinion in *Zablocki,* Justice Powell suggested that "[s]tate regulations . . . includ[ing] bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests" should not be reviewed under a "'compelling state purpose'", test. 434 U.S. at 399. Finally, it should be mentioned that in *Carey, supra,* Justice Rehnquist stated in a dissenting opinion that he regarded

Doe v. Commonwealth's Attorney, which upheld the Virginia sodomy statute, as "definitively" establishing the validity of criminal statutes prohibiting certain consensual acts. *Carey,* 431 U.S. at 718 n.2.

Respondent cannot show that there is any fundamental right to the private consensual practice of sodomy. As has been demonstrated, the fundamental rights question cannot be resolved by perusing the latest public opinion poll. Rather, the question is whether this society recognizes a right to the practice of sodomy which is fundamental in a historical and traditional sense. After all, neither the Constitution nor the Fourteenth Amendment was written yesterday. The recent decriminalization movement, itself, shows that historically and traditionally no fundamental right has been recognized to the practice of sodomy. [8] *If historical and traditional attitudes had been tolerant of the practice, no decriminalization movement would be needed.*

Both of the major lower court decisions which hold that sodomy is imbued with a right of privacy failed to apply the historical analysis which this Court has used in its privacy decisions. In neither *Hardwick* nor *Onofre* did the courts address the issue of whether sodomy has traditionally and historically been considered a fundamental right.

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[8]The decriminalization movement also shows that the political branches of government are responsive to changes in public morality and consensus. When our political representatives are mandated by their respective electorates to change the law in this area, presumably they do so. That this has happened in some states certainly does not establish any fundamental right to the practice of sodomy. Rather, it simply shows that our representative government is working as designed.

VI. ANY DEPARTURE FROM THE HISTORICAL ANALYSIS EMPLOYED BY THIS COURT IN ITS PREVIOUS PRIVACY DECISIONS WOULD SERIOUSLY UNDERMINE THE INSTITUTIONS OF THIS NATION AND COULD LEAD TO THE INVALIDATION OF ALL REGULATIONS OF PRIVATE CONDUCT.

If this Court fails to reverse the Eleventh Circuit in this case and steer the development of the right of privacy back to the historical path previously set by the Court, the stability and identity of this society will be eroded because it has been built upon a foundation inconsistent with the legalized practice of homosexuality. In addition, the integrity of constitutional construction will suffer.

A number of enticing formulae have been proposed as substitutes for the historical analysis which this Court has previously prescribed for determining the scope of the right of privacy. The nearest at hand is that of the Eleventh Circuit in this very case. Although it is difficult to discern the explanatory principle of the court's decision, it appears that the Eleventh Circuit would protect all "individual decisions critical to personal autonomy" and their "public consequences" which have to do with sexual activity of a private and consensual nature. 760 F.2d at 1211. The court also noted that for some people "the sexual activity in question here serves the same purpose as the intimacy of marriage" which was protected in *Griswold. Hardwick, 760 F.2d* at 1212. Thus, it appears that the Eleventh Circuit would cloak with the right of privacy all private activities which, for those involved, "serve[] the same purpose as the intimacy of marriage." The Eleventh Circuit has moved from the original purpose of the privacy doctrine of protecting the intimacy of marriage and family to the protection of anything which might take the place of marriage for the individual involved.[9] This is a far cry from

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[9]The degree to which private consensual sodomy serves the purpose of marriage in this society is highly debatable. Of course, the fundamental

this Court's teaching in *Roe v. Wade,* that "only personal rights that can be deemed 'fundamental' or implicit in the concept of ordered liberty . . . are included in this guarantee of personal privacy." 410 U.S. at 152 (cit. omitted).

The New York Court of Appeals has also proposed a new rationale for the right of privacy. That court held in *Onofre* that the right of privacy guarantees "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint." 415 N.E.2d at 939. A search of the court's opinion for a governing principle which might be used to identify and limit the decisions and conduct which are to be protected yields only the conclusion that physical harm must be shown in order to justify regulation of such matters.[10]

(Footnote 9 continued)
feature of marriage is a bilateral dependency and fidelity. Extreme sexual promiscuity is a well-known featury of the "gay" sub-culture. See M. Hunt, *Gay: What You Should Know About Homosexuality* 157 (1977) ("The average gay man has one thousand different sex partners in a lifetime, most of whom are strangers and one-time partners. In contrast, the average straight man has from five to nine sex partners in a lifetime, most of them persons he cares about and has sex with repeatedly.")

[10]In *On Liberty* (1859), John Stuart Mill argued that "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others." *Id.* at 10-11(1975 ed.). The manner in which American courts have been influenced by Mill is astounding. For example, in *Commonwealth v. Bonadio,* 490 Pa. 91, 415 A.2d 47 (1980), the Pennsylvania Supreme Court quoted Mill in concluding that the Pennsylvania sodomy statute denied equal protection. 415 A.2d at 50-51. The Fourteenth Amendment of the Constitution may incorporate many things, but it does not incorporate the libertarian ideals of Mill. *See Paris Adult Theater I v. Slaton,* 413 U.S. 49, at 68 n.14 (1973) (expressly rejecting Mill's views with respect to "the proposition that conduct involving consenting adults only is always beyond state regulation").

A number of commentators also propose new approaches to the right of privacy. For example, Professor Richard B. Saphire suggests as the "seeds of a guiding principle" the following: "Those decisions that 'fundamentally affect the person' and necessarily implicate human 'emotions and sensations' in deep and profound ways are entitled to at least some measure of constitutional protection." Saphire, *Gay Rights and the Constitution*, 10 U. Dayton L. Rev. 767, 787-88 (1985). Another matrix for deciding what should be protected by the right of privacy is offered by Professor David A. Richards:

> We have proposed a theory of the *form* of considerations which must be assessed [sic] considering issues involving the constitutional right to privacy, namely, (1) whether, in the light of contemporary evidence, there is any good moral reason to believe that certain conduct, traditionally conceived as morally wrong, is wrong at all; (2) whether the conduct relates to basic life plan choices; and (3) consequent on (2), whether paternalistic considerations are radically inappropriate.

Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights in the Unwritten Constitution,* 30 Hastings L. J. 957, 1014 (1979) (emphasis in original). *See also* K. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 625 (1980).

For the Court to follow of any of the suggestions mentioned above, including that of the Eleventh Circuit in this case, would constitute a total departure from the historical approach employed in the Court's previous privacy decisions and would amount to acceptance of the proposal declined in *Roe v. Wade,* that "one has an unlimited right to do with one's body as one pleases." 410 U.S. at 154. A rejection of the tether of history would also constitute a renunciation of any restrictions on judicial decisions in this area. Such a departure would represent an

unprincipled effort "to keep the Constitution in tune with the times," *Griswold, supra,* at 522 (Harlan, J., concurring), without regard to the amending process and the responsibilities of the political branches. It would also seriously undermine the integrity of constitutional construction.

If the restraints of the historical approach are rejected and the right of privacy is extended to protect all private, consensual, and seemingly non-harmful activities, the very foundations of this society will be shaken. As was discussed previously, this Court has on many occasions recognized the fundamental role of monogamous marriage and the family unit in American society. Not only does the unregulated practice of sodomy not lie at the base of all our institutions, but our institutions are built on a foundation which is incompatible with such practices—i.e., monogamous marriage and the family unit.

Any decision treating the practice of sodomy as constitutionally protected would inevitably carry additional baggage. There is already a building clamor from some quarters for the legalization of homosexual marriages.[11] Judge Bork expressed his fear in *Dronenburg,* that the protection of homosexual conduct through the right of privacy will lead to the protection of all private sexual behavior:

We would find it impossible to conclude that a right to

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[11]In *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed,* 409 U.S. 810 (1972), and *Singer v. Hara,* 11 Wash. App. 247, 522 P.2d 1187 (1974), it was concluded that the refusal of the respective states to issue marriage licenses to homosexual couples did not violate constitutional rights. The issues are discussed in G. Buchanan, *Same-Sex Marriage: The Linchpin Issue,* 10 U. Dayton L. Rev. 541 (1985). *See also* Saphire, *supra,* at 790 ("There is no reason in either logic or human nature why these human capacities and aspirations cannot be developed and expressed in other forms of society than a traditional heterosexual marriage. Consequently, there is no convincing rationale for limiting the right to privacy to the traditional marriage.")

> homosexual conduct is "fundamental" or "implicit in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw.

741 F.2d at 1369. A similar fear was expressed by Judge Gabrielli in his dissent in *Onofre:*

> Moreover, if the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution, and homosexual marriage. I very much regret that the majority has failed in its discussion of the "fundamental right" to personal autonomy to set forth analytical framework for resolving difficult questions such as these.

415 N.E.2d at 950 n.3.

These fears are well founded. A rejection of historical analysis in favor of any of the tests proposed above, including that of the Eleventh Circuit, would appear to legalize polygamy, homosexual marriage, incest, necrophilia, private use and possession of many controlled substances, bestiality, fornication, adultery, and perhaps prostitution. There are some who genuinely favor the legalization of such activities, but the point here is not the desirability *vel non* of legalization. The point is that the Court is not a "super-legislature," *Griswold,* 381 U.S. at 482, empowered to adjudicate according to the personal preferences or political agendas of its members or any other persons or institutions. Instead, the Court's job is to expound the Constitution. As has been demonstrated, no responsible analysis of the Fourteenth Amendment can include the practice of sodomy in the right of privacy. Any appropriate changes to this Georgia statute should be made by the Georgia legislature,

which is responsible to the citizens of that State. *See Doe v. Commonwealth's Attorney,* 403 F. Supp. at 1200, 1202; *Baker v. Wade, 774 F.2d at 1286-87; Dronenburg,* 741 F.2d at 1397 ("if the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.")

VII. THE GEORGIA SODOMY STATUTE SHOULD NOT BE INVALIDATED UNDER THE EQUAL PROTECTION CLAUSE INASMUCH AS IT IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

Since the Eleventh Circuit based its decision on the right of privacy, *amici curiae* assume that no equal protection issue is before the Court. If, however, the Court should address equal protection issues, it is the position of these *amici curiae* that no form of strict or heightened scrutiny should be employed. This case is not appropriate for the application of either the fundamental rights or the suspect classification branch of strict scrutiny. For the reasons presented above the Georgia statute does not burden fundamental rights. Moreover, the statute does not involve a suspect or quasi-suspect classification so as to trigger heightened review. A number of lower court decisions have held that homosexuality is not a suspect or quasi-suspect. classification. *See Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education,* 729 F.2d. 1270, 1273 (10th Cir. 1984); *Hatheway v. Secretary of the Army,* 641 F.2d 1376, 1382 (9th Cir. 1981), *cert. denied,* 454 U.S. 864 (1981); *DeSantis v. Pacific Telephone & Telegraph Company,* 608 F.2d 327 (9th Cir. 1979); *Singer, supra,* 522 P.2d at 1192. Therefore, state action based on homosexual classifications should be evaluated only under a rational basis test. In *Doe v. Commonwealth's Attorney,* 403 F. Supp. at 1202; *Baker v. Wade,* 769 F.2d at 292; and *Dronenburg,* 741 F.2d at 1397-98, the rational basis test was employed.

Although the case before the Court has never been tried and the State has had no opportunity to present evidence regarding the interests served by the statute, it can be judicially noticed that the statute is rationally related to the State's legitimate interest in preserving and protecting morality.[12] As this Court has held in other contexts, legislative bodies may act "to protect *'the social interest in order and morality.'*" *Paris Adult Theatre I,* 413 U.S. at 61, *quoting Roth,* 354 U.S. at 485 (cit. omitted) (emphasis added by Court in *Roth*). *See also Paris Adult Theatre I,* 413 U.S. at 59-60 ("there is a 'right of the Nation and of the States to maintain a decent society' ") (cit. omitted); *United States v. Orito,* 413 U.S. 139, 144 (1973), *quoting North American Co. v. SEC,* 327 U.S. 686, 705 (1946) ("Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.")

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[12]The extraordinary health risks which accompany homosexual practices are well known. These include the current epidemic of Acquired Immune Deficiency Syndrome (AIDS). It appears that factual development would be necessary before the relationship, if any, between the Georgia statute and the reduction of such risks could be evaluated.

CONCLUSION

For the above-stated reasons, the judgment of the Eleventh circuit should be reversed.

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APPENDICES

APPENDIX A

Apart from the recognition of sodomy as a common law crime, the following jurisdictions had enacted sodomy statutes prior to the adoption of the Fourteenth Amendment in 1868*:

Alabama (1819)

Aiken's Digest of Alabama Laws, Penal Code, c. 6, § 7, p. 239 (Supp. 1841).

Ala. Code, Art, 5, § 3235 (1852).

Arizona (Terr.)

Howell Code, c. 10, § 48 (1865).

Arkansas (1836)

Ark.Rev.Stat., c. 44, div. III, Art. IV, § 3, p. 245 (1837).

California (1850)

Cal.Sess.Laws, c. 99, § 48 (1849-50).

Colorado (Terr.)

Colo.(Terr.)Rev.Stat., c. 22, §§ 45, 46, p. 203 (1868); Colo.Gen. Laws of Terr. of Colo., 1st Sess., § 46, p. 297 (1861).

Connecticut (1788)

Laws of Conn., Capital Laws, § 7 (1673).

An Act for the Punishment of Divers Capital and other Felonies, p. 66 (1784).

Acts and Laws of the State of Conn., p. 182, para. 2 (1796).

Conn.Rev.Stat., tit. 6, c. 7, § 77, p. 237 (1849).

Conn.Rev.Stat., tit. 6, c. 7, § 77, p. 323 (1854).

Conn.Gen.Stat., tit. 12, c. 7, § 124, p. 265 (1866).

Delaware (1787)

Laws of 1719, c. 22, § 5, The First Laws of the State of Delaware 67 (J. Cushing ed. (1981).

Del.Rev.Stat., tit, 20. c. 131, § 7, p. 485 (1852).

Florida (1845)

Act of Mar. 5, 1842, § 1, Digest of the Statute Law of the State of Florida, div. 4, tit. 1, c. 7, § 11, p. 500 (Thompson 1847).

* Dates of admission to the Union are indicated in parentheses.

Georgia (1788)

Ga.Pen.Code of 1816, 5th Div., §§ 35-36, Compiled Laws 1810-1819, p. 571 (Lamar 1821).

Ga.Pen.Code, div. 4, § 63 (1833), Digest of the Statute Laws of the State of Georgia, p. 787 (Cobb 1851).

Code of Ga., pt. IV, tit. 1, div. IV, §§ 4251, 4252, 4255, pp. 824-25 (1861).

Ga.Rev.Code, §§ 4286, 4287, 4290, p. 841 (1867).

Kingdom of Hawaii

Hawaii Pen. Code, c. 13, § 9 (1850).

Illinois (1818)

Ill.Rev.Code, Crim. Code. §§ 49, 50, pp. 132 (1827).

Ill.Rev.Stat., Crim. Code, §§ 49, 50, pp. 179-180 (1833)

Ill.Rev.Stat., c. 30, div. 5, §§ 49, 50, p. 158 (1845).

Kansas (1861)

Kan.(Terr.)Rev.Stat., c. 53, § 7, p. 284 (1855).

Kan.Gen.Stat., c 31, § 231, p. 368 (1868).

Kentucky (1792)

Act of Feb. 10, 1798, § 4; Digest of the Statute Laws of Kentucky, vol. 2, p. 1265 (Morehead & Brown 1834).

Ky.Rev.Stat., c. 28, art. 4, § 11, p. 249 (1852).

Ky.Rev.Stat., vol. 1, c. 28, art. 4, § 11, p. 381 (Stanton 1860).

Louisiana (1812).

La.Rev.Stat., Crimes and Offenses, § 5, p. 136 (1856).

Maine (1820)

Act of Feb. 19, 1821, Me. Laws, vol. 1, c. 5, p. 61 (1821).

Me.Rev.Stat., tit. 12, c. 160, § 4, p. 685 (1840).

Me.Rev.Stat., tit. 11, c. 124, § 3, p. 684 (1857).

Maryland (1788)

Act of 1793, c. 57, § 10.

Act of Nov. 1809, c. 86; Revised Laws of Md., vol. 3, p. 460 (Maxcy 1811); Gen. Publ. Stat. vol. I, p. 575 (Dorsey 1840).

Md. Code, vol. 1, art. 30, § 201, p. 251 (1860).

Massachusetts (1788)

Body of Liberties of 1641

Code of 1648

Book of the General Laws and Liberties (Mass), p. 5 (1648).

Mass.Acts & Resolves, c. 133, § 1, p. 209 (1804-05).

Mass.Rev.Stat., pt. 4, tit. 1, c. 130, § 14, p. 741 (1836).

Mass.Gen.Stat., c. 165, § 18, p. 819 (1860).

Michigan (1837)
Act of 1816 (Cass Code), §§ 4, 57; Laws of Terr. of Mich. 1805-1825, vol. 1, pp. 109, 132 (1871).
Act of 1820 (Cass Code), § 4; Laws of Terr. of Mich. 1805-1825, vol. 1, p. 562 (1871).
Act of 1827 for Punishment of Crimes, § 4; Laws of Terr. of Mich., pp. 444-45 (1833)
Mich.Rev.Stat., pt. 4, tit. 1, c. 8, § 14, p. 648 (1837-38).
Mich.Rev.Stat., tit. 30, c. 158, § 16, p. 682 (Green 1846).
Mich.Comp.Laws, vol. 2, c. 185, § 16 (§ 5871), p. 1543 (1857).

Minnesota (1858)
Minn.(Terr.)Rev.Stat., c. 107, § 13, p. 520 (1851).
Minn.Rev.Stat., c. 100, § 13, p. 622 (1866).

Mississippi (1877)
Act of Feb. 15, 1839, Miss. Code, c. 64, tit, VII, § 20, p. 980 (Hutchinson 1848).
Miss.Rev.Code, c. 64, art. 238, p. 611 (1857).

Missouri (1821)
Mo.Rev.Stat., art. VIII, § 7, p. 206 (1835).
Mo.Rev.Stat., vol. 1, c. 50, art. VIII, § 7, p. 624 (1856).

Montana (Terr.)
Mont. (Terr.) Laws, Criminal Practice Acts, c. 4, § 44, p. 185 (1864).

Nebraska (1867)
Neb.(Terr.)Rev.Stat., Crim. Code, c. 4, § 47, pp. 599-600 (1866).

Nevada (1864)
Act of Nov. 26, 1861, Nev.Comp.Laws, vol. 1, c. 55, § 2351, p. 565 (1861-73).

New Hampshire (1788)
Act of Feb. 8, 1791, N.H. Laws, pp. 269-70 (1785-96).
Act of June 19, 1812, § 5, N.H. Rev.Laws, p. 318 (1815).

New Jersey (1787)
N.J.Rev.Stat., tit. 8, c. 1, § 9, p. 259 (1847).

New York (1788)
N.Y.Rev.Stat., vol. 3, pt. 4, c. 1, tit. 5, art. 3, § 20, p. 970 (1858).

North Carolina (1789)
N.C.Rev.Stat., c. 34, § 6, p. 192 (1836-37).
N.C.Rev.Code, c. 34, § 6, p. 203 (1854).

Oregon (1859)
Ore.Rev.Stat., Crimes and Misdemeanors, c. 11, § 12, p. 235 (1855)

Act of Oct. 19, 1864, § 639, Ore. Code, vol. 1, Criminal Code, tit. 2, c. 7, § 1874, p. 951 (1887).

Pennsylvania (1787)

Act of January 12, 1705-06, in Stat. at Large of Pa. from 1682-1801, vol. 2 (1700-1712), p. 183 (1896) (repealed by Act of March 31, 1860, Pub.Law 451).

Act to Reform the Penal Laws of the State, § 2 (1790), in Laws of the Commonwealth of Pa. vol. 2, p. 531 (1810).

Act of March 31, 1860, § 32, Pub.Law 392, in Digest of Statute Law of Pa. 1700-1903, vol. 1, p. 1011 (Purdon 1905).

Rhode Island (1790)

Acts and Laws of the Colony of Rhode Island, p. 6 (1719).

R.I. Pub. Laws, p. 339 (1822).

R.I. Pub. Laws, Crimes and Punishments, § 90, p. 394 (1844).

R.I.Rev.Stat., c. 216, § 11, p. 544 (1857).

R.I.Gen.Stat., c. 232, § 12, pp. 553-54 (1872).

South Carolina (1788)

Act of 1712, pp. 465, 493, in Stat. at Large of S.C. 1682-1716, vol. 2, p. 493 (Cooper 1837).

Tennessee (1796)

Tenn.Rev.Stat., Penal Laws and Penalties, § 17, p. 246 (1831).

Tenn. Code, § 4843, p. 868 (1857).

Texas (1845)

Act of Feb. 11, 1860, p. 97; Tex.Rev.Stat., Penal Code, tit. 10, c. 5, art. 342, p. 46 (1879); Digest of the Laws of Texas, art. 2033, pp. 430-31 (Paschel, 2d ed. 1870).

Vermont (1791)

Act of Feb. 19, 1779, Laws of Vermont 1777-1780, p. 128 (A. Soule ed. 1964).

Virginia (1788)

Va.Code Revision of 1777. (*See* D. Malone, *Jefferson the Virginian* 271-73 (1948)).

Va. Code, tit. 54, c. 197, § 12, p. 740 (1849).

Code of Va., tit. 54, c. 196, § 12, p. 804 (1860).

W. Virginia (1863)

Before 1863, *see* Va. Code.

W. Va. Code, c. 149, § 12, p. 694 (1868).

Wisconsin (1848)

Wis.Rev.Stat., c. 139, § 15, p. 709 (1849).

APPENDIX B

The following state sodomy statutes are currently in force:

Ala. Code § 13A-6-65 (a) (3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411, 1412 (Supp. 1984-1985); Ark. Stat. Ann. § 41-1813 (1977); D.C. Code Ann. § 22-3502 (1981); Fla. Stat. Ann. § 800.02 (West 1976); Off. Code Ga. Ann. § 16-6-2 (1984); Idaho Code §§ 18-6605, 6606 (1979); Kan. Stat. Ann. § 21-3505 (Supp. 1984); Ky. Rev. Stat. Ann. § 510.100 (Baldwin 1985); La. Rev. Stat. Ann. § 14:89 (West Supp. 1985); Md. Code Ann. art. 27, §§ 553, 554 (Supp. 1984); Mass. Ann. Laws, ch. 272, §§ 34, 35 (Michie/Law. Co-op. 1980); Mich. Comp. Laws Ann. §§ 750.338, 338a (West 1968); Minn. Stat. Ann. § 609.293 (West Supp. 1985); Miss. Code Ann. § 97-29-59 (1973); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. § 45-5-505 (1985); Nev. Rev. Stat. § 201.190 (1979); N.C. Gen. Stat. § 14-177 (1981); Okla. Stat. Ann. tit. 21, § 886 (West 1983); R.I. Gen. Laws § 11-10-1 (1970); S.C. Code Ann. § 16-15-120 (Law Co-op 1985); Tenn. Code Ann. § 39-2-612 (1982); Tex. Penal Code Ann. § 21.06 (Vernon 1974); Utah Code Ann. § 76-5-403 (Supp. 1983); Va. Code § 18.2-361 (1982).

CERTIFICATE OF SERVICE

I, GEORGE M. WEAVER, Attorney of Record for *amici curiae* and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief *Amici Curiae* upon counsel of record for Petitioner and Respondent by depositing copies of this brief in the United States mail with proper address and adequate postage to:

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This _____ day of December, 1985.

George M. Weaver

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-140

In The
Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK and JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK BY ITS COMMITTEE ON SEX AND LAW IN SUPPORT OF RESPONDENT HARDWICK

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK BY ITS COMMITTEE ON SEX AND LAW IN SUPPORT OF RESPONDENT HARDWICK

The Association of the Bar of the City of New York, by its Committee on Sex and Law, hereby submits its brief *amicus curiae* in support of respondent Michael Hardwick pursuant to Rule 36.2 of the Rules of the Supreme Court. The written consent of all parties hereto is being filed simultaneously with this brief.

INTEREST OF AMICUS

The Association of the Bar of the City of New York (hereinafter "the Association"), chartered by the State of New York in 1871, is an organization of approximately 15,000 lawyers, most of whom practice or reside in the New York City metropolitan area. The Association has had a long-standing commitment to criminal law reforms and to the principle of individual liberty including the reasonable expectation of privacy. The Association's commitments to these broad goals have been demonstrated by the filing of *amicus* briefs, testimony before legislative bodies, publication and dissemination of reports, and the issuance of public statements. The Association conducts its work through committees. The committee with jurisdiction of the subject matter of this appeal, the Committee on Sex and Law (hereinafter called "the Committee"), has been authorized by the Association to file this brief.

The Association has a deep interest in the outcome of this case. When the New York Court of Appeals considered whether the right of adults to engage in private consensual sexual conduct is protected by the federal Constitution in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981), the Association filed an *amicus* brief urging the court to find the New York consensual sodomy statute, New York Penal Law § 130.38, unconstitutional. As a consequence of the *Onofre* decision, private sexual conduct between consenting adults has been lawful in New York since 1980.

This brief is submitted because the Association, through the work of the Committee, recognizes that im-

portant issues of fundamental fairness and privacy affecting citizens of the State of New York as well as all citizens of the United States may be reached by this Court's consideration of this case. The federal constitutional right of privacy, as it relates to consensual, sexual activity between adults acting in private, is an issue implicated herein. A decision by the Court on this issue may well sweep beyond the State of Georgia to affect citizens in states such as New York, in which laws criminalizing private intimate behavior have been judicially stricken as unconstitutional.[1] Because the Association is concerned about the consequences of this case for the millions of citizens across the country whose interests might be affected, it wishes to present its views as *amicus curiae* in support of the decision reached below by the United States Court of Appeals for the Eleventh Circuit.

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[1] The courts of several states have previously held that statutes criminalizing private sex between consenting adults violate federal constitutional rights. *See State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (Iowa criminal sodomy statute invalidated); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (N.J. criminal fornication statute invalidated); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (Pa. Voluntary Deviate Sexual Intercourse Statute invalidated); *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981) (N.Y. consensual sodomy statute invalidated); *see also Doe v. Duling*, 603 F.Supp. 960 (E.D. Va. 1985) (Va. fornication and cohabitation statutes invalidated). In addition, twenty-two states have legislatively decriminalized consensual sodomy between adults in private. *Onofre*, 51 N.Y.2d at 491 n.5, 434 N.Y.S.2d at 95.

PRELIMINARY STATEMENT

On August 3, 1982 respondent Michael Hardwick was arrested by the Atlanta police for violating the Georgia criminal sodomy statute, Off. Code Ga. Ann. § 16-6-2, with a consenting adult in the bedroom of his home. Section 16-6-2 provides, in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .[2]

After his arrest, Hardwick filed this suit in the United States District Court for the Northern District of Georgia seeking a declaration that § 16-6-2 was unconstitutional. Defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Their motion was granted and Hardwick appealed. The United States Court of Appeals for the Eleventh Circuit reversed, holding that the statute infringed upon Hardwick's fundamental rights, and remanded for trial.

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2 The statute applies irrespective of the gender, marital status or sexual orientation of the parties to the offense.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly determined that the right to freedom from unwarranted governmental intrusion into protected zones of privacy warrants remand of this case for trial. The two zones of privacy identified by this Court, privacy of the home and privacy in personal decisions relating to intimate association, were both invaded when the police arrested Michael Hardwick for engaging in consensual sex with an adult in his bedroom. Thus, the case should be remanded for consideration of the State of Georgia's interest in regulating such conduct and the narrowness of the language of § 16-6-2.

Several state courts of last resort have invalidated statutes criminalizing private consensual adult sex as violative of constitutional rights. Reversal of the decision below would undermine the decisions of these courts and could potentially recriminalize conduct that has been lawfully and regularly engaged in for years, subjecting millions of Americans to the danger of arrest and prosecution. Affirmance of the decision below, by contrast, would allow a determination of the validity of such statutes on a state-by-state basis, and avoid penalizing citizens of states whose statutes are not before this Court for review.

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ARGUMENT

The decision below held that Off. Code Ga. Ann. § 16-6-2 infringed upon the fundamental constitutional rights of Michael Hardwick, because "[t]he activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." 760 F.2d at 1212. The decision did not, however, invalidate the statute. Rather, it remanded the action to the trial court for determination whether a) the State of Georgia has an interest in regulating such activity sufficiently compelling to justify the statute and b) § 16-6-2 is a properly tailored means of safeguarding that interest. *Id.* at 1213. Thus, the court below did not reach the issue of the state's interest, if any, in regulating private adult sexual activity and its decision does not present that issue for review.

I. HARDWICK'S ARREST FOR ENGAGING IN CONSENSUAL SEX WITH ANOTHER ADULT IN THE BEDROOM OF HIS HOME INFRINGED HIS FUNDAMENTAL RIGHT TO FREEDOM FROM UNWARRANTED GOVERNMENTAL INTRUSION

For many years this Court has recognized the fundamental constitutional right of American citizens to freedom from unjustified governmental intrusion into certain "zones of privacy." *Griswold v. Connecticut,* 381 U.S. 479 (1965). A century ago, in *Boyd v. United States,* 116 U.S. 616 (1886), the Court considered the scope of the Fourth Amendment mandate that "[t]he right of the people to be secure in their persons, [and] houses . . . shall not be violated." In invalidating a customs statute as violative of

this right, the Court relied on principles settled during the colonial period in *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [*T*]*hey apply to all invasions on the part of the government and its employes of the sanctities of a man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .

116 U.S. at 630 (emphasis supplied).

In 1928, Justice Brandeis, citing *Boyd* in *Olmstead v. United States*, 277 U.S. 438 (1928), set forth a classic statement of our right as Americans to freedom from governmental intrusion:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. *They sought to protect Americans in* their beliefs, their thoughts, *their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

277 U.S. at 478 (dissenting) (emphasis supplied). The Brandeis view in *Olmstead* has since prevailed, *Katz v. United States*, 389 U.S. 347 (1967), and has been cited re-

peatedly in subsequent cases as the law of the land. *E.g. Winston v. Lee,* — U.S. —, —, 105 S.Ct. 1611, 1615-16 (1985); *Whalen v. Roe,* 429 U.S. 589, 599 n. 25 (1977); *Eisenstadt v. Baird,* 405 U.S. 438, 453 n. 10 (1972); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (Goldberg, J., concurring).

This constitutional "right to be let alone" has been recognized most frequently in two contexts: in private homes and in personal decisions concerning intimate association. Indeed, these are the two zones of privacy most clearly delineated by the decisions of this Court.

The fundamental sanctity of a person's home is manifest both from the text of the Constitution, *see* Third and Fourth Amendments, and from the cases holding unjustified governmental intrusions into the home violative of constitutional rights. The leading case, *Stanley v. Georgia, supra,* arose when a search of a home pursuant to a warrant obtained in connection with a bookmaking investigation uncovered pornographic films in Stanley's bedroom. Stanley was arrested and convicted of possession of obscene materials. Although the Court observed that the First Amendment does not generally protect obscenity, it recognized that Stanley asserted "the right to satisfy his . . . *emotional needs* in the privacy of his own home." 394 U.S. at 565 (emphasis added).[3] Accordingly, it held that

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[3] These "emotional needs" undoubtedly encompassed Stanley's "choice to seek sexual gratification by viewing" the films. *People v. Onofre,* 51 N.Y.2d 476, 487, 434 N.Y.S.2d 947, 950 (1980), *cert. denied,* 451 U.S. 987 (1981).

his possession of otherwise regulable films inside his home was protected from state interference. "Whatever may be the justifications for . . . statutes regulating obscenity, we do not think they reach into the privacy of one's home." *Id.*

This Court has interpreted *Stanley* as standing for a right of "privacy of the home," which Chief Justice Burger has characterized as "hardly more than a reaffirmation that 'a man's home is his castle.' " *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

A more recent exposition of the right to privacy of the home is contained in *Payton v. New York*, 445 U.S. 573 (1980):

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734.

Id. at 589-90. In holding that the police cannot make a routine felony arrest by entering a suspect's home without a warrant, the Court emphasized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Id.* at 601. Justice Blackmun, concurring, applied a balancing test to conclude, "The suspect's interest in the sanctity

of his home . . . outweighs the governmental interests." *Id.* at 603.

A second zone of privacy in which citizens enjoy constitutional protection from unwarranted governmental intrusion is the area of personal decisions concerning intimate association. *See generally* Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624 (1980). In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court struck down a statute which forbade the use of contraceptives by married people, on the ground that it infringed "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.[4] The right of privacy in personal decisions concerning intimate association was applied to protect unmarried persons in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), in which the Court held:

> [W]hatever the rights of the individual to access to contraceptives may be, *the rights must be the same for the unmarried and the married alike.*
>
> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relation-

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[4] The Court in *Griswold* was mindful of the fact that intimate association involving the use of contraceptives most often occurs in the home.

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy . . . .
>
> *Id.*

> ship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If *the right of privacy* means anything, it *is the right of the individual,* married or single, *to be free from unwarranted governmental intrusion into matters* so *fundamentally affecting a person* as the decision whether to bear or beget a child.

Id. at 453 (emphasis added).[5] More recently, this zone of privacy was held also to protect such decisions "fundamentally affecting a person" as the decision to terminate a pregnancy, *Roe v. Wade,* 410 U.S. 113 (1973), and to marry. *Zablocki v. Redhail,* 434 U.S. 374 (1978).

The inclusion of personal decisions to engage in intimate association within a constitutionally protected zone of privacy was reaffirmed and elaborated in *Carey v. Population Services International,* 431 U.S. 678 (1977). There, the Court, in striking down a criminal statute prohibiting the sale, advertisement and distribution of contraceptives under certain circumstances as violative of the right to make such personal decisions, observed that "the outer limits of this aspect of privacy have not been marked by the Court." 431 U.S. at 684. The Court expressed its solicitude for "a field that by definition concerns the most intimate of human activities and relationships." *Id.* at 685.

Necessarily implicit in the constitutional protection accorded to personal decisions concerning the most inti-

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[5] Indeed no foundation exists in either the text or the history of the Constitution for the suggestion that its protections might differ based on a person's marital status. Section 16-6-2, in any event, applies by its terms to married as well as unmarried citizens.

mate of human activities and relationships is protection for an adult's decision to engage in non-procreative sexual behavior in private. The right to use contraceptives recognized in *Griswold* and its progeny logically entails the right of the user to engage in non-reproductive sex. And, if users of contraceptives have such a fundamental right, so must all Americans. This rationale compelled the New York Court of Appeals, in considering the same issue, to conclude that "the right enunciated in *Griswold* . . . [was] to make decisions with respect to the consequences of sexual encounters and, necessarily, to have such encounters." *People v. Onofre*, 51 N.Y.2d 476, 487, 434 N.Y.S.2d 947, 950, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981). *See Doe v. Duling*, 603 F.Supp. 960, 967 (E.D.Va. 1985) ("[T]he constitutional right to privacy extends to a single adult's decision whether to engage in sexual intercourse.").[6]

Hardwick's arrest in this case demonstrates that § 16-6-2 intrudes on both of the constitutionally protected zones of privacy, each of which requires elevated scrutiny under applicable precedents. He was arrested for conduct which occurred in the privacy of the bedroom of his home. 760 F.2d at 1204. Under *Stanley, supra*, conduct in the home, particularly the bedroom, is entitled to special protection.

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[6] Although Justice Powell, concurring in *Carey*, wrote that the Court's decision "would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review," 431 U.S. at 703, this analysis applies only to private, consensual, non-commercial conduct between adults. Thus, although the instant case does not raise such issues, prostitution, coercive sex, sex with minors, and sex in public places fall outside of the protected zone due either to their public nature or to the fact that no voluntary personal decision is involved.

Moreover, he was arrested for engaging privately in intimate conduct with a consenting adult. Under *Griswold*, *Eisenstadt* and *Carey*, such conduct implicates a fundamental right. Thus, the statute as applied to Hardwick unquestionably invaded the two zones recognized by this Court as lying within the constitutional right to privacy.

II. THE ELEVENTH CIRCUIT CORRECTLY REMANDED FOR DETERMINATIONS WHETHER 1) THE STATE OF GEORGIA HAS A COMPELLING INTEREST IN RESTRICTING PRIVATE ADULT INTIMATE CONDUCT AT HOME AND 2) THE CHALLENGED STATUTE IS PROPERLY TAILORED TO MEET THE STATE'S GOAL

Although statutes are not automatically invalid when they burden fundamental constitutional rights, they are subjected to a special standard of review. In cases involving such statutes, the Court has required states to justify the burden by demonstrating a compelling interest, and by showing that the statutory language is narrowly drafted to protect only that interest. *Carey v. Population Services International*, 431 U.S. at 686; *Roe v. Wade*, 410 U.S. at 155.[7] For this reason, the court below properly remanded for trial on these two issues, rather than invalidating § 16-6-2 as unconstitutional on its face. 760 F.2d at 1213.

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[7] In his concurring opinion in *Carey*, Justice Powell suggests that the "compelling state interest" standard should be applied to state legislation which "implicates sexual freedom . . . only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area." 431 U.S. at 705. Section 16-6-2 satisfies this standard because the flat criminalization of certain private intimate behaviors—with a minimum penalty of imprisonment for not less than one year—demonstrably "frustrates or heavily burdens" the exercise of constitutional rights.

In the present procedural posture, the Court is not being asked to invalidate Georgia's sodomy law, since the trial court might find that the statute satisfies the two-part test. Nor is the Court properly being asked to consider any reasons that may be advanced to justify the statute, since the state's justifications are not brought into question by the decision below. The only question presented here is whether the settled rights to privacy of the home and in intimate associations require a state to show compelling justification for a statute authorizing the arrest of citizens for engaging in intimate associations at home.

The approach urged here will simply allow the courts to determine, on a state-by-state basis, whether particular state statutes criminalizing private adult intimate behavior at home are justified under applicable constitutional standards. Accordingly, the decision below should be affirmed.

—o—

CONCLUSION

For all of the reasons stated above, the Association of the Bar of the City of New York urges the Court to affirm the decision of the Court of Appeals for the Eleventh Circuit, and to remand the action to the District Court for trial.

Respectfully submitted,

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No. 85-140

In The
Supreme Court of the United States
October Term, 1985

MICHAEL BOWERS,
Attorney General of Georgia,

Petitioner,

v.

MICHAEL HARDWICK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE FOR LESBIAN RIGHTS PROJECT, WOMEN'S LEGAL DEFENSE FUND, EQUAL RIGHTS ADVOCATES, INC., WOMEN'S LAW PROJECT, and NATIONAL WOMEN'S LAW CENTER

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INTEREST AND DESCRIPTION OF AMICI CURIAE

This brief *amicus curiae* in support of respondents is submitted on behalf of the Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project and National Women's Law Center.*

The Lesbian Rights Project is a public interest law firm doing impact litigation and providing no-fee legal services for lesbians and gay men who encounter discrimination on the basis of sexual orientation. Founded in 1977, the Lesbian Rights Project is the only legal organization in the country which emphasizes litigation and public education in areas of law of special concern to lesbians, including the right of a parent to child custody and visitation without reference to the parent's sexual orientation, equal access for lesbians and gay men to adoption and foster parenting, the right of non-marital partners to speak for each other in the event of incapacity or illness, and the right of non-marital partners to equal employment benefits. The Project also does legal work in the area of employment discrimination, insurance discrimination, access to public accommodations, discrimination in the military, and decriminalization of private consensual sexual behavior.

Women's Legal Defense Fund (WLDF) is a private non-profit membership organization located in Washington, D.C. It was founded in 1971 to assist women in their efforts to achieve equality under the law. WLDF is dedicated to eliminate sex discrimination and sex stereotypes, and believes that discrimination against lesbians and gay men is intricately connected to discrimination against women in our society. WLDF further believes that the right to control over one's body, which encompasses matters of

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* Letters from counsel for all parties consenting to the filing of this brief are being filed with the Clerk.

reproduction and sexuality, is critical to the achievement of equality between the sexes.

Equal Rights Advocates, Inc. is a San Francisco-based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as *amicus*, in numerous employment discrimination cases.

The Women's Law Project is a non-profit feminist law firm which seeks to advance the legal status of women through litigation, public education, and individual counseling. During the past eleven years its activities have included work in the fields of health, reproductive freedom, employment, domestic relations, housing, insurance, credit, education, and constitutional privacy. Women's Law Project has become a unique resource for the women of Philadelphia and Pennsylvania, as well as an organization recognized nationally for its expertise and commitment in the field of women's rights.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose of protecting and advancing women's rights. The Center represents women's concerns before federal administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Amici curiae assert that the continued criminalization of private consensual adult sexual behavior is of grave

concern, not only to lesbians and gay men, but to all women and men who value the right of the individual to intimate self-expression and personal autonomy.

SUMMARY OF ARGUMENT

Amici curiae Lesbian Rights Project et al. contend that the right of privacy, as derived from the U.S. Constitution and Bill of Rights, readily and reasonably includes the right of an adult person of whatever sexual orientation (to wit., whether heterosexual, bisexual, gay or lesbian) to choose to engage in physically private, consenting, non-violent sexual activities with another adult person. *Amici* believe that the privacy decisions of this Court, from the earliest to the most recent, support the position that it is within the fundamental rights of the individual person to make such intimate personal choices as are not only proscribed but criminalized by the "anti-sodomy" law of the State of Georgia. *Amici* for respondents assert that the need for love is natural, and that the determination to express and receive love of a sexual nature by engaging in sexual activities with another adult of the same gender is one possible type of behavior within the range of medical and psychological normalcy.

Amici for respondents further contend that government will suffer a loss of respect if the U.S. Constitution is read to undercut the claim of the individual to a right to privacy in the circumstances at bar. Not only will the state be invited to police the sacred precincts of bedrooms, marital and non-marital alike, thus denigrating the role and relationship of law enforcement to the individual citizen, but governments such as that which adopted the "anti-sodomy" law as issue in the case at bar, will be lent the imprimatur of this Court in enacting homophobic laws and

enforcing discrimination based on sexual orientation on an open, *de jure* basis. This Court and this nation should have learned to recognize the irrationality and wastefulness of such discrimination, from the lesson of this Court's own decisions, which first validated, and since have had to repair, the harms done by *de jure* discrimination against women and people of color. Responsibility, and the privacy that is designed to enforce and protect it against unwarranted governmental interference, must be held to rest with the individual for his/her private, consenting, adult sexual activities, where no violence, coercion or threat of unwanted public exposure is present.

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ARGUMENT

INTRODUCTION

For tens of millions of adult persons in the United States, this case concerns the relationship between the boundaries of government and the boundaries of the human self. For this Court and this legal system, this case concerns the constitutionality not simply of one state's "anti-sodomy" law but of the exercise of state power to criminalize those tens of millions of adults in the United States.

It would be impossible accurately to determine the number of adult persons in the United States who have engaged in or are likely in the future to engage in sexual activities that would violate a law prohibiting all oral-genital and anal-genital contacts. Indeed, it is impossible precisely because of the "privacy" in which people tend to hold this type of sexual information about themselves. Law itself upholds the reasonableness of the person's expectation that his/her sexual acts, if conducted with the consent of the participants, in physical privacy, between

adults will not be the subject of inquiry, intrusion or action by anyone else, including government.[1] While it is possible to imagine a government that would set about inquiring about and cataloguing sexual activities among its subjects, surely transplanting that imagined possibility to the shores and mountains and cities of the United States would chill the hearts of the vast majority of subjects of this government.[2]

In spite of the impracticability of statistical assessment of the commonness of the sexual practices criminal-

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[1] In the context of civil enforcement of the human person's federal constitutional right to privacy, this expectation has been upheld. *See*, e.g., *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1977) (city employer's questions to police officer concerning his sex life, and specifically his relationship to a recently emancipated female with whom he was living were held to violate his federal constitutional right to privacy); *Mindel v. U.S. Civil Service Commission*, 312 F.Supp. 485, 487 (N.D. Cal. 1970) (plaintiff public employee's right to privacy and to due process were held to have been violated where his employer, U.S. Postal Service, deprived him of his employment based upon the "immorality" of his living with a female not married to him; District Court agreed with plaintiff that "[t]he spectre of the government dashing about investigating this non-notorious and not uncommon relationship . . . is the most disturbing aspect of this case"); cf. *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (public employer's questions to female police officer candidate concerning her lawful sex life were held to violate employee's right to freedom from discrimination under Title VII of the Civil Rights Act of 1964, as amended).

[2] For example, in Nazi Germany, the Nuremberg Laws, passed in 1935, outlawed both marriage and extramartial sexual relations between Jews and non-Jews. W. Shirer, *The Nightmare Years: 1930-1940* 159 (1984). The end result of the Nazi system of inquiry into and cataloguing of sexual activities included torture and executions of those deemed to be sexually aberrant. "By 1945 there were more than a thousand concentration camps in Germany, Austria and occupied countries. Besides Jews, who constituted the vast majority of those killed, the approximately seven million people killed included . . . homosexuals. Their unspeakable agony was exacerbated by the infamous medical experiments. . . ." M. Daly, *Gyn/Ecology:* The Mataethics of Radical Feminism 300 (1978).

ized by the Georgia statute here at issue, it seems reasonable to project, based on available data, that oral-genital and anal-genital modes of sexual expression are commonly engaged in by tens of millions of gay, lesbian, bisexual and heterosexual adult persons in the United States.[3] Assuming as the data suggest that gay, lesbian and bisexual persons constitute a minority numbering around twenty million persons in the U.S.,[4] the overwhelming majority of persons engaging in sexual activities that would violate Georgia's law, then, are persons of heterosexual orientation.

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[3] *See, e.g.*, A. Kinsey, *et al. Sexual Behavior in the Human Female* 281 (1953) (50% of female respondents had been orally stimulated by male partners; approximately 40% of female respondents had orally stimulated their male partners); A. Kinsey, *et al., Sexual Behavior in the Human Male* 371 (1948) (60% of male respondents had engaged in oral-genital contact, either heterosexual or homosexual); S. Hite, *The Hite Report: A Nationwide Study of Female Sexuality* 232 (1976) (97% of female respondents had been orally stimulated by a partner); S. Hite, *The Hite Report on Male Sexuality* 1110, 1121 (1981) (approximately 95% of male respondents had been orally stimulated by a partner; approximately 96% of all respondents had orally stimulated a female partner); C. Tarvis and S. Sadd, *The Redbook Report on Female Sexuality* 162, 163 (1977) (91% of the women had performed fellatio with their husbands; 42% of the women had engaged in anal intercourse with their husbands); L. Wolfe, *The Cosmo Report* 312 (1981) (84% of female respondents engage regularly in fellatio with male partners; 13% engage regularly in anal sex with male partners).

[4] "There are some 20 million lesbians and gay men living in the United States today. These men and women represent a community that is as diverse as American society. There are gay people in every economic class, racial group, religious organization, and occupation." D. Hitchens, Foreward to H. Curry & D. Clifford, *A Legal Guide for Lesbian and Gay Couples* (2d ed. 1984). According to one past president of the American Psychiatric Association, "It is fair to conclude, conservatively, that the incidence of more or less exclusively homosexual behavior in Western culture ranges from 5 to 10 percent for adult males and from 3 to 5 percent for adult females. If bisexual behavior is included, the incidence may well be twice these figures." J. Marmor, *Homosexual Behavior: A Modern Reappraisal* 7 (1980).

For all of these tens of millions of persons, regardless of sexual orientation, this case involves an issue of the most vital and fundamental nature. The issue is whether a state is free, under the U.S. Constitution, to criminalize sexual activities engaged in by them as consenting adults, in physically private locations, because of the gender(s) of the partners involved and/or because of the specific parts of the body used. The potency of the criminal sanction is self-evident, and need not be belabored in this forum. What is at stake in the case at bar is nothing more or less than the capacity of states to render millions of their citizens subject to the consequences of criminality, including prosecution, trial, sentence/penalty and lifelong stigmatization and suffering that can accompany conviction for crimes.

In a very real and profound sense, this case concerns a highly essential question to be asked about the relationship between the person and his/her government. That question is: what is the proper basis for limiting the prerogatives of the latter to govern the former? This issue, which has absorbed sentient beings including hundreds of accomplished philosophers for centuries, is to be answered as it applies to the case at bar by resort to a body of legal precedent interpreting the U.S. Constitution, and to the theories of the members of this Court as to the meanings of those precedents.

Regardless of the particular positions and beliefs of the members of this Court relative to this case, there is one view that *amici* urge should be universal among the decision-makers: this case must not be trivialized, whether because it arises in relation to the subject of sex, or because petitioner asserts that it concerns the right to "commit homosexual sodomy", or because the respondent Hardwick represents an oft-despised and heavily stereotyped sexual

minority, or because enforcement of "anti-sodomy" laws in this country to date has been erratic and, at least relative to the frequency of sexual activities violating "anti-sodomy" laws, presumptively infrequent. None of these aspects of this case should be allowed to minimize its significance. This case is of surpassing importance, not only to the millions of people directly (if not necessarily consciously[5]) affected by the outcome, but to the respect and authority of our governmental system itself and of the Constitution upon which it stands.

I. IT IS NO COINCIDENCE THAT THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY HAS BEEN DEVELOPED IN LARGE MEASURE IN CASES CONCERNING PERSONAL DECISIONS ABOUT SEX; SEXUAL MATTERS ARE INTEGRAL TO HUMAN PERSONALITY AND HUMAN RELATIONSHIPS.

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[5] It is doubtful that the average heterosexual person expects to be prosecuted and convicted for his/her private consenting adult sexual activities, whatever this Court may hold as to the power of the state to do so. By contrast, gay, lesbian and bisexual persons have considerably more reason to fear prosecution, penalties and their civil consequences, given the differential history of "anti-sodomy" law enforcement against sexual minorities. As of 1969, only fifteen years ago, only Illinois among the 50 states had decriminalized private consenting same-gender sexual contacts. Ill. Rev. Stat. c. 38, §§ 11-2, 11-3 (1961), discussed in S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 9 (1st ed. 1969). While "well over half the population of the [United States] now resides in locations in which one may enjoy autonomy in one's decision-making related to one's sexual relationship," *Sexual Orientation and the Law* 11-12 (R. Achtenberg, ed. 1985), a holding by this Court that Georgia is within constitutional bounds in criminalizing "sodomy" would empower the twenty-five (25) states that have decriminalized this range of sexual behaviors to re-criminalize it, to the detriment of gay, lesbian and bisexual persons who constitute the demonstrable majority of those persons against whom such laws historically have been enforced, even if such laws theoretically encompass heterosexual as well as homosexual conduct.

A. The Right To Be Sexual In Consenting, Non-Violent And Physically Private Ways Constitutes One Essential Dimension Of Personal Privacy Of The Adult Human Being.

The right to privacy derived from the Bill of Rights has been developed by this Court in a deep if not an exceedingly long line of cases, many of which have concerned decision-making by persons and government about sexual matters.[6] *Amici* assert that it is no coincidence that those cases, like the case at bar, involve a sexual subject matter. Sex is very important to people and, generally, people associate sexual matters with privacy.[7] The cases decided by this Court concerning the constitutional development of privacy as it relates to sexual matters typify the sorts of difficult, life-altering decisions people are required to reach everyday concerning sex (e.g., methods of birth control; sterilization; choice of marital partner; pregnancy in relation to both the family and employment).

Once asked by a journalist at the turn of this century to define "mental health", Sigmund Freud is reputed to have replied: "It is to love and to work". Love is a multi-faceted human need. For most adults, at least some forms

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[6] *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *LaFleur v. Cleveland Board of Education*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[7] See cases cited at n. 1, *supra*. Also, R. Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980); K. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980); T. Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L.Rev. 233 (1977); M. Dunlap, *Toward Recognition of "A Right To Be Sexual"*, 7 Women's Rts. L.Rptr. 245 (Spring 1982).

of love include a strong sexual element. Except for persons who have chosen celibacy, the human being's crucial psychological need to share sexual love requires some form of physical action for its fulfillment and expression. By no means are all forms of love "Platonic"[8]. Certainly judging by the wealth of literature and philosophical work devoted to sexual matters over the centuries, personal decisions about sex compose an extremely important human activity. It would not be an overstatement to rank sexual activity and the resulting self-expression as a highly important human need.[9] Not only is sexual activity neces-

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[8] Petitioner erroneously asserts that ". . . there is no validation for sodomy found in the teaching of the ancient Greek philsophers Plato or Aristotle." (Pet. Brief 20 and n.2 thereof). Although Plato's non-demonstrativeness and his view of the inappropriateness of sexual expression generally have given rise to the common understanding of a "Platonic" relationship as a non-sexual one, and although it has been said of Plato, the man, that "[o]f love between the sexes . . . he had no experience . . . nor would he have valued it highly," D. Lee, trans., Introduction to *The Republic of Plato* 46 (1974), considerable scholarship concerning Plato's milieu, attitudes and experience has defined him and his era as (at least) highly tolerant of sexual expression of love between males, in a culture persuaded of the naturalness and normalcy of homosexuality. K. Dover, *Greek Homosexuality* 12, 154 (1978). The scholars do mention that homophobia existed in ancient Greece, however, to the extent that the passive receptivity of the male in some forms of same-sex intercourse was considered womanish and therefore undesirable. Perhaps homophobia stemmed in ancient Greece and stems today in the United States in part from the fears of sexual passivity, rape, physical subjugation of the female part of the self and domination by the male that co-exist and correlate with sexism toward women. *See*, S. Brownmiller, *Against Our Will: Men, Women and Rape* 257-268 (1975). In any event, petitioner seriously misstates Greek history and classical philosophy in an avid search to find support for the categorical assertion that sexual activity between two persons of the same gender "for hundreds of years, if not thousands, has been uniformly condemned as immoral." (Pet. Brief 19).

[9] *See* generally, H. Katchadourian and D. Lunde, *Fundamentals of Human Sexuality* 2 (1972); J. McCary, *McCary's Human Sexuality* 11, 137 (1978).

sary to procreation; for an indeterminately large number of persons, voluntary sexual activity is a critical component of human happiness and personal fulfillment.

At the same time, involuntary sexual acts constitute a major form of serious crime, and sexual activity whether or not voluntary carries risks, varying in intensity from displeasure and discomfort to disease[10] and unwanted parenthood. Where violence, coercion, overreaching or involuntary public exposure are at issue, the state has been held to have power to regulate sexual behavior, and personal privacy finds boundaries in these situations.[11] How-

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[10] Counsel for *amicus* David Robinson Jr., in behalf of petitioner, argues that the phenomenon of AIDS justifies the State of Georgia in criminalizing all oral-genital and anal-genital contacts. Because AIDS appears to be caused by exchange of bodily fluids, resulting in transmission of the infecting virus to the blood stream (*see, e.g.,* J. Curran, *et al., The Epidemiology of AIDS: Current Status and Future Prospects,* 229 Science 1352-1357 (Sept. 1985)), Robinson's argument should include the position that AIDS empowers the State of Georgia to criminalize contact between penis and vagina, since it poses the likelihood of exchange of semen and vaginal fluids, not to mention blood and mucus. Logically, Robinson's position should be that the State is empowered to prevent AIDS by prohibiting all sexual activities that countenance any risk of exchanging bodily fluids, no matter what the genders of the partners. There are no known instances where AIDS has been contracted through sexual activity between women. There are 158 known cases where women have contracted AIDS through heterosexual activity. The Center for Disease Control considers lesbians at a lower risk of contracting AIDS through sexual activity than heterosexual women (Telephone interview with Chuck Fallis, Public Affairs Specialist, Public Affairs Office, Center for Disease Control, Atlanta, Ga. (Jan. 22, 1986)). Moreover, because lesbians enjoy the lowest rate of AIDS, by Robinson's hypothesis, lesbian sex ought to be the only kind that a state can permit during the pendency of the AIDS epidemic. These points underscore the utter irrationality of the Robinson hypothesis.

[11] The power of states to prevent and punish violent and coercive sexual activity is expressed in sexual assault and rape laws, for example, and is in no way disputed in the case at bar. As to

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ever, in the case at bar, respondent Hardwick was arrested in the bedroom of his own home and charged with committing an act of sodomy (Jt.App. 4); here there is no evidence of violence, coercion, overreaching, or involuntary public exposure in relation to Hardwick's sexual activity.

The homophobic argument of petitioner to the contrary notwithstanding, gay, lesbian and bisexual persons hold no monopoly on the negative side of sexual activities, either in terms of being assaultive[12] or in terms of sexually

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the matter of states' power to prevent involuntary public exposure to sexual activities, the states' authority likewise has been found to be constitutionally grounded. "Granting that society can proceed directly against the 'sexual embrace at high noon in Times Square' (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)), an appeal to such extremes should not provide the pretext for withdrawing all constitutional protection from sexual conduct whenever the participants fail to hermetically seal their actions (footnote omitted)." L. Tribe, *American Constitutional Law* 948 (1978); *see also, Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211, 215 n. 13) (1975) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 (1976) (regulation of locations of pornographic theatres to prevent unwanted public exposure is constitutional, if drawn to meet governmental interests without undue discrimination).

[12] Petitioner argues that "[h]omosexual sodomy . . . is marked by . . . a disproportionate involvement with adolescents (footnote omitted) and . . . a possible relationship to crimes of violence." (Pet. Brief 37) These arguments are factually unsupported. To the extent petitioner seeks to implant the idea that homosexuals prey upon unconsenting youths, this position likewise is false; is based upon a notorious and unsupported stereotype. *See*, D. Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality*, 11 Golden Gate U. L. Rev. 635; D. Hitchens & B. Price, *Trial Strategy In Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 Golden Gate U. L. Rev. 451, 452-461 (1978-1979) (discussion of pervasiveness and falsity of stereotype of "lesbian mothers" as persons who "molest children, and engage in sexual activity in front of children"). If the term "disproportionate" in petitioner's argument is supposed to suggest a contrast with the degree of heterosexual involvement in coercive, non-consensual sexual acts with adolescents, again,

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transmitted diseases.[13] In this regard, the effort of petitioner and of *amicus* Robinson to use AIDS to justify failing to protect the right of privacy of homosexuals amounts to an expedient and perverse use of half-informed fears about a tragic and deadly disease to twist law around a moralistic condemnation of an entire class of human beings. In their AIDS argument, more than in any other argument they offer, petitioner and *amicus* Robinson seem to be overwhelmed by the weight of homophobia. Homophobia is a burdensome form of bigotry that has been in search of justification for centuries.[14]

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it is a false contrast; it would appear that the most common form of such coercive, non-consensual sexual acts as to minors is incest, which to date appears chiefly to be a male-adult-on-female-minor pattern. E. Press, H. Morris, R. Sondza, *An Epidemic of Incest*, 98 Newsweek 68 (11/30/81) (estimating that at least one in one hundred adult women in the United States has been sexually molested by her father); J. Herman, *Father-Daughter Incest* (1981) (projecting that when close relatives are included, one adult woman in every six in the United States has been a victim during childhood/adolescence of sexual molestation by males); K. Meiselman, *Incest* 52 (1978); J. Densen-Gerber & J. Benwad, *Incest as a Causative Factor in Anti-Social Behavior: An Exploratory Study* (1976); J. James & J. Meyereding, *Early Sexual Experience and Prostitution*, 134 American Journal of Psychology 1381-1385 (1977) (incest is responsible for the largest percentage of female teenage runaways and an even larger percentage of prostitutes). Perhaps most important, petitioner's arguments constitute a *non sequitur;* the frequency of sexual coercion and violence as to teenagers by homosexuals no more forms a proper basis for denying constitutional privacy to physically private, consenting *adult* homosexual contacts than the above-recited frequency of sexual coercion and violence as to minor females by adult heterosexual males provides a proper basis for denying constitutional privacy to physically private, consenting adult heterosexual contacts.

[13] *See* note 10 and accompanying text, *supra.*

[14] "Homophobia" was first coined by psychologist George Weinberg, author of *Society and The Healthy Homosexual* (1972), to describe an irrational fear and hatred of homosexuals and of their sexuality. T. Marotta, *The Politics of Homosexuality* 265

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This Court's decisions concerning federal constitutional privacy have firmly established that the right to privacy in the context of decision-making about a variety of sexual matters is both personal and fundamental. The case at bar cannot validly and convincingly be distinguished from those decisions by the assertion that they concern sex within marriage[15]. Nor can those cases accurately be characterized as concerning exclusively family matters.[16] Along with decisions on the subjects of marriage[17] and family life[18], the range of constitutional privacy decisions of this Court encompasses the rights of unmarried persons[19] and of minors[20] to have contraceptives, the right of a person to possess pornography in his home[21], and the fundamental nature of the right of a person to retain his procreative capacity where a state

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(1981). Such irrational repulsion can take the form of dread at being in close quarters with gay men or lesbians (Weinberg at 4-5); anxiety about being thought a homosexual; hostility towards touching between members of the same sex (eg., football players may safely pat each other on the buttocks but not walk together hand in hand, as noted in Slade, *Displaying Affection in Public*, NY Times, Dec. 17, 1984 at B14, col. 1); violent assaults against perceived homosexuals; strongly held, irrational stereotypes, such as that homosexuals are all child molesters or oversexed (reminiscent of an era, a century ago, in which the New York Times could run an article insisting that black men were prone to rape, P. Giddings, *When and Where I Enter* 92 (1984); and the conviction that homosexual men and women—by reason of sin, sociopathology or sickness—are not entitled to the full benefits of citizenship.

15 Pet. Brief 25.

16 Pet. Brief 27, 30.

17 *Griswold v. Connecticut* and *Loving v. Virginia*, cited at note 6, *supra*.

18 *Zablocki v. Redhail*, *Moore v. City of East Cleveland*, *Pierce v. Society of Sisters*, cited at note 6, *supra*.

19 *Eisenstadt v. Baird*, cited at note 6, *supra*.

20 *Carey v. Population Services International*, cited at note 6, *supra*.

21 *Stanley v. Georgia*, cited at note 6, *supra*.

law would have required sterilization of him as a member of a certain group of criminal convicts (in a decision rendered prior to an explicit holding by this Court that privacy itself is guaranteed by the Constitution[22]).

To propose that constitutionally protected privacy is not available to those of every sexual orientation whose consensual, adult, physically private sexual activities are considered unorthodox by the majority of a given state's legislators, no matter how common the activities are in fact, is circular. To propose that because they are unmarried[23], constitutionally protected privacy is unavailable to those of non-heterosexual orientation for sexual choices that preclude them from marriage, particularly when it is the state that keeps the gates of marriage and excludes gay and lesbian persons from that estate[24], is viciously circular. The effort of petitioner to undermine respondents' assertion of a right to privacy that includes the right to choose to engage in physically private, consenting oral-genital and anal-genital sexual activities between adults, by characterizing this Court's privacy decisions as protecting only married persons and their families, seriously misstates the case law. Also, it invites this Court to make the scope of federal constitutional privacy depend on and vary with the marriage and domestic relations laws of the fifty states.[25] The equal protection guarantee and the fun-

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22 *Skinner v. Oklahoma*, cited at note 6, *supra*.

23 Pet. Brief 37-39.

24 In *Baker v. Nelson*, 291 Minn. 310 (1971), *app. dismissed*, 409 U.S. 810 (1972) and in *Singer v. Hara*, 11 Wash. App. 247 (1974), the state courts held that state laws proscribing same-gender marriage are constitutional. Neither of these decisions squarely addresses the federal constitutional right to privacy in relation to these holdings.

25 Presently no state legitimates marriage between two males or two females; thus, at present no gay or lesbian marital partner

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damental nature of the right to privacy should fully deter this Court from entering upon that mistaken road.[26]

If this Court is to uphold Georgia's "anti-sodomy" law as against gay, lesbian and bisexual persons, this Court will sweep aside its own informed decisions about the nature of privacy and of the relationship between the person and government. The gist of those decisions[27] is that there is a realm of personal choice, of which sex-related choices constitute a vital part, in which the government's coercive force (and, particularly, the criminal sanction) does not belong, constitutionally speaking. That realm of personal choice is properly characterized as being enjoyed primarily by adults, with respect to intimately personal matters such as whether to bear or beget a child, whether to engage in procreative sexual activity, whether to marry a person of a different racial group, whether to possess pornography in one's home, whether to secure birth control information and contraceptives, and whether to have an abortion prior to viability of the foetus. Whether to consent to engage in physically private sexual activities of a non-injurious[28], non-violent nature with an-

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could successfully claim a federal right to privacy deriving from his/her marriage in a state authorizing such marriage. However, in that the states do retain the power to define who may marry, once any state validates same-gender marriage, the federal constitutional right to privacy would vary according to state law.

[26] *See* notes 24 and 25, *supra*.

[27] *See* cases cited at note 6, *supra*.

[28] Of course, it may be argued that some of the activities prohibited by the Georgia law can cause AIDS, veneral disease and other health hazards. However, so can genital-genital intercourse between a male and a female, as discussed in note 10, *supra*. The position that the Georgia law is based upon a need to prevent AIDS is simply unsupported by the content of the statute itself, which is overbroad (some anal-genital and some oral-genital contacts do not involve exchange of bodily fluids and

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other adult snugly and logically fits within that area of personal decision-making circumscribed by the privacy decisions of this Court.

B. Georgia's Definition Of "Sodomy" Criminalizes Sexual Conduct In Which Persons Of Every Sexual Orientation Engage; The Definition Assures Built-In Discrimination In Law Enforcement.

The Georgia law, by its terms, includes a wide array of prohibited acts under the rubric of "sodomy". *Amici* already have observed that millions of adult persons in the U.S. would be rendered criminals if the Georgia law were adopted and enforced nationwide. It also has been noted that the statute prohibits sexual activities that are less dangerous, in terms of the spread of at least some sexually transmitted diseases, than contact between penis and vagina.[29] Along with these deficiencies in this law, it must be observed that the law prohibits sexual activities that may be the only ones available to meet the fundamental needs for sexual fulfillment and communication of some groups of persons. For example, disabled persons may not have use or control of genitals for sexual purposes and may need to engage in anal-genital or oral-genital sexual activities to express and gratify themselves

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do not appear to carry high risks of transmission of AIDS and venereal disease) and underinclusive (genital-genital intercourse, which does involve exchange of bodily fluids, and which carries risks of transmission of AIDS and venereal disease) is not prohibited. The constitutional deficiencies of this type of law are well-recognized. The inadequacies of the AIDS argument to justify an "anti-sodomy" law of the type and scope here at issue also have been ably addressed by the District Court in *Baker v. Wade*, 106 F.R.D. 526 (1985), 553 F. Supp. 1121 (1982), *rev'd on other grounds*, 769 F.2d 289 (1985).

[29] *See* notes 10 and 28.

sexually.[30] Sexually dysfunctional persons may need these forms of activities as well, if they are to have any means of sexual satisfaction and expression.[31]

As written, the sweep of Georgia's "anti-sodomy" statute is unrestrained. Its terms beg for discriminatory enforcement, and its application to potentially millions of persons invites hypocrisy and arbitrariness in that enforcement process. As one criminal law scholar, Dean Sanford Kadish, observed almost two decades ago, after noting that the then-pervasive criminal laws prohibiting homosexual practices had little if any deterrent effect:

> . . . the use of the criminal law has been attended by grave consequences. Opportunities for enforcement are limited by the private and consensual character of the behavior . . . To obtain evidence, police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution (See Project, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement in Los Angeles County", 13 U.C.L.A. L.Rev. 643 (1966)).[32]

Because of the breadth and variety of sexual acts prohibited by it, the Georgia law also assures hypocrisy in enforcement, even if it ever were feasible to enforce it

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[30] *See, e.g.*, J. Brockway, *et al., Effectiveness of a Sex Education and Counseling Program for Spinal Cord Injured Patients*, 1 Sexuality and Disability 127-136 (1978) (program of rehabilitation for heterosexual persons with spinal cord injuries to learn to use oral-genital sexual techniques); J. Brockway, *et al., Sexual Enhancement in Spinal Cord Injured Patients: Behavioral Group Treatment*, 3 Sexuality and Disability 84-96 (1980). *See also* J. Lessing, Sex and Disability in J. Loulan, *Lesbian Sex* 151-158 (1984).

[31] *See generally*, H. Kaplan, *The New Sex Therapy: Active Treatment of Sexual Dysfunctions* (1974); and W. Masters and V. Johnson, *Human Sexual Inadequacy* (1970).

[32] S. Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 157, 159-162 (1967).

against all of those who violate its quite capacious terms. If the sexual activities engaged in by tens of millions of persons, including oral-genital and anal-genital contact between male-male, female-female and male-female partners, are representative of the sexual activities engaged in by police officers, judges, jurors, prosecutors and others involved in enforcing the Georgia law and like laws of other states, then there will be many occasions where a lawbreaker will arrest, prosecute, convict or sentence another lawbreaker for acts that s/he also has done. There can be no more hypocritical quality to law enforcement than this.

Feminist poet and philosopher Adrienne Rich has written of the danger of hypocrisy about sexuality, in moving terms, as follows: "Heterosexuality as an institution has also drowned in silence the erotic feelings between women. I myself lived half a lifetime in the lie of that denial. That silence makes us all, to some degree, into liars . . . The possibilities that exist between two people . . . are . . . the most interesting things in life. The liar is someone who keeps losing sight of these possibilities."[33] Where the enforcers of the law are as pervasively "guilty" of violating it as those punished by the enforcers under the law, the "lying" becomes a devastating and encompassing dishonesty that corrupts the law itself. Surely Georgia's "anti-sodomy" statute is the prototype of laws that are "unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[34]

C. Government Has Important And Legitimate Interests In Recognizing The Privacy Of Adults Who Engage In Consensual Sexual Activities In Physically Private Locations.

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[33] A. Rich, *Women and Honor: Some Notes on Lying* (5th printing, 1979).

[34] T. Arnold, *Symbols of Government* 160 (1935).

The limitation upon the power of states that will be represented by this Court's decision in favor of the individual's right to privacy as asserted by respondents Hardwick *et al.* does not undercut the power of the state to act to prohibit dangerous, irresponsible or coercive sexual activities, nor to protect persons from violence, nor to protect minors, nor to protect persons from crimes committed within sexual relationships (e.g., sexual assaults by familiars). Rather, a decision in favor of the decision-making power of Hardwick *et al.* as to whether to engage in private, consenting, non-violent sexual activities with others of the same or different sexes places responsibility precisely where it belongs and is most manageable—upon the shoulders of the person making the decision, affected by the decision, and living with the consequences of the decision. "*Responsibility is the great developer of men.*"[35]

A decision that places the responsibility on the individual involved removes government from the position of moral arbiter in this complex arena of human behavior. "Any 'higher law' philosophy implies a hierarchy of values"[36], and for this Court to determine that the state is in a better position than its citizens to say what types of non-harmful sex are appropriate and good lofts governmental power over the conscience and moral judgment of the individual. The government is placed in a position of being "better" than its citizens. This is particularly anomalous in a system in which the government is supposed to be its citizens, including minorities. The central argument of the Attorney General of Georgia is that all

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[35] *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 92 (1936) (Brandeis, J., concurring) (emphasis added).

[36] W. Friedman, *Legal Theory* 143 (5th ed., 1970).

persons who engage in "sodomy" as Georgia defines it are immoral and it is that immorality that empowers the state to prohibit "sodomy". If this Court were to accept that argument, it would be passing judgment upon the lives and behaviors of millions of human beings. It also would be deciding that the state has a right to punish its citizens for physically private consenting adult sexual activities, thus diminishing the citizens' capacities for responsible individual judgment in the area of consenting adult sexual behavior.

Such a position by this Court would invite not simply discriminatory, homophobic and arbitrary law enforcement, and not simply hypocrisy behind that process. The end result would be dependence and weakness of the individual relative to the government. The individual would have been deemed less capable than the state of managing her/his own most intimate, personal decisions. If it is true that people have a way of living up or down to the expectations of those who govern them, then a decision by this Court that arrogates to the state the power to make intimate sexual choices for individuals assuredly invites people to live down to this Court's unfavorable image of the capabilities of the individual. As discussed here and in the section that follows, the policy considerations accompanying the substantive issue presented by the case at bar cut decidedly in favor of the vindication of the privacy model to place freedom and responsibility for decisions by adults about physically private, consenting sexual behavior upon the individual.

II. IF THIS COURT LIMITS CONSTITUTIONALLY PROTECTED PRIVACY AS URGED BY PETITIONER, IT WILL BE LENDING ITS UNPARALLED AUTHORITY TO RAMPANT

DE JURE AND DE FACTO DISCRIMINATION AGAINST A MINORITY GROUP, FOR NO GOOD REASON.

Throughout the United States, anti-gay violence and anti-gay bigotry are posing real and ongoing problems for lesbians, gay men and for those who are concerned with fair treatment of all minority groups.[37] At the same time, discrimination against gay men and lesbians in employment[38], domestic relations[39], public accommodations[40], and other vital realms of human existence[41] are the subjects of myriad legal challenges, with varying results. In this milieu, a determination by this Court that states are free to criminalize gay/lesbian sexual activities *per se* would reinforce the homophonic elements of both anti-gay

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[37] It has been reported that one (1) of five (5) gay males and one (1) of ten (10) lesbians surveyed in eight (8) cities in the United States have been punched, kicked, hit or beaten because they are gay/lesbian. National Gay Task Force (in cooperation with gay and lesbian organizations in eight U.S. cities), "Anti-Gay/Lesbian Victimization: A Study" (New York: June 1984) (unpublished).

[38] *See, e.g., Rowland v. Mad River School District*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1373 (1985); *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981); *Aumiller v. University of Delaware*, 434 F.Supp. 1273 (D.Del. 1977); *Gay Law Students v. Pacific Telephone & Telegraph Co.*, 24 C.3d 458 (1979); *Gaylord v. Tacoma School District*, 88 Wash. 2d 286 (1977), *cert. denied*, 434 U.S. 879 (1977); *see generally, Sexual Orientation and the Law* at Chapter 5, pp. 5-1 through 5-71, cited at note 5, *supra*.

[39] *See generally, Sexual Orientation and The Law*, Chps. 1 & 2, pp. 1-3 through 2-58, cited at note 5, *supra*.

[40] *See, e.g., Hubert v. Williams*, 133 Cal.App.3d Supp. 1 (1982) (denial of housing to disabled person and his lesbian attendant was violation of California's public accomodations law); *see generally, Sexual Orientation and the Law* at Chap. 8, pp. 8-3 to 8-20, cited at note 5, *supra*.

[41] *See generally, Sexual Orientation and the Law*, Chaps. 3 (taxes), 4 (death, incapacity and illness), 6 (military and veterans), 7 (immigration), 9 (First Amendment), cited at note 5, *supra*.

violence and the anti-gay legal decisions that are proliferating at the present time. Criminalization of gay/lesbian sexual activities excuses and encourages already pervasive civil discriminations against these groups of persons. If this Court were to uphold Georgia's power to make criminals of Hardwick *et al.*, this Court would be lending its unparalleled leadership to the position that it is acceptable to hate those who are gay and lesbian, and even to prosecute and punish those unfortunate enough (as respondent Hardwick was) to have their entirely unobtrusive and non-public sexual activities come to the attention of criminal law authorities.

At present, "[t]he presence of the criminal penalty in a state casts a shadow over other areas (eg., custody, immigration, and licensing) and contributes to the patchwork of results".[42] If this Court were to lend its imprimatur to the position that all sexually active gay, lesbian and bisexual persons may be treated as criminals *per se*, that shadow would lengthen and deepen to cover practices of anti-gay discrimination and violence of unmeasured proportions. While decriminalization hardly would render any of these other types of suffering by gay and lesbian persons *necessarily* less likely[43], the denial of any right of privacy to gay and lesbian persons represents an approval, howsoever tacit and sublimated, of all of these re-

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[42] R. Rivera, *Queer Law: Sexual Orientation Law In The Mid-Eighties, Part I*, 10 U. Dayton L.Rev. 459, 540 (Spring 1985).

[43] The experience of England after passage of an act decriminalizing homosexual conduct is instructive in this regard. "The Act did not legalize homosexuality; it merely removed criminal penalties from a fairly narrow range of homosexual activities . . . [continuing to permit a wide array of criminal prosecutions of gay persons] . . . [t]he 1967 Act has not secured for homosexual men and women a rightful and equal place in society. It was not intended to." P. Hewitt, *The Abuse of Power: Civil*

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lated forms of discrimination and violence. In this era of severe homophobic reactions, fanned by the fear of AIDS, this message from this Court would be quite likely to prove nothing short of devastating to the struggle for a measure of decency and fairness in treatment afforded to gay, lesbian and bisexual persons by neighbors, employers and others including government. Criminalization translates readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian persons in this culture, society and legal system.[44]

There is an interesting debate about whether being gay/lesbian is a matter of genes, of compulsion, of par-

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Liberties in The United Kingdom 221 (1982). The author of this study on the state of civil liberties in the United Kingdom concludes that "[i]n order to guarantee homosexual men and women their right to equality of treatment, the law on homosexual offenses should be placed on the same basis as the law relating to heterosexual offenses . . . Far from protecting society, the [current] law demeans both its victims and those who enforce it. P. 227. In England, unlike the United States, there is no federally protected constitutional right to privacy for anyone.

[44] Formidable examples of the high price of criminalization of homosexuality *per se* include: cases upholding denials of child custody based in part on the criminalization of homosexuality, *see, e.g., L. v. D.*, 630 S.W.2d 240 (1982); *N.K.M. v. L.E.M.*, 606 S.W. 2d 179 (1980); *Roe v. Roe*, 228 Va. 722 (1985); cases upholding dismissals from public employment of persons based upon criminal law convictions for same-gender sexual relations, *see, e.g., Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed by agreement of parties*, 379 U.S. 951 (1964); *McLaughlin v. Board of Medical Examiners*, 35 Cal.App.3d 1010 (1973); cases in which courts have proposed to limit freedoms of speech and association based upon the existence of state sodomy proscriptions, *see, e.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Gay Activists Alliance v. Lomenzo*, 66 Misc.2d 456, 320 N.Y.S.2d 994 (1971), *reversed sub nom., Owles v. Lomenzo*, 38 App.Div.2d 981, 329 N.Y.S.2d 181 (1972) *aff'd.*, 31 N.Y.2d 965 (1973).

enting or of personal choice. One commentator summarizes it as follows:

> Homosexual activity is sometimes explained as "compulsive activity", that is, acts which are beyond free choice. Others claim that it is the outcome of a deliberate choice motivated by curiosity, opportunity, or caring for another person of the same sex. Some say that physiological factors, such as sex hormone levels, are at the root of homosexuality. Still others claim that homosexuality begins in the home . . .[45]

Perhaps unfortunately, resolution of that interesting debate would be of little help to this Court in deciding this case. If homosexuality is controlled by factors outside personal volition, then to punish gay/lesbian sex *per se* is to criminalize a status over which the person does not have control. Such status-based criminalization has been recognized as unfair by this Court in the contexts of drug addiction and alcoholism.[46] Even this legally protective

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[45] R. Slovenko, Foreward, *The Homosexual and Society: A Historical Perspective*, 10 U. Dayton L.Rev. 456 (Spring 1985).

[46] *Robinson v. California*, 370 U.S. 660, 667 (1962) (criminal offense of "addiction to narcotics" held to violate Eighth and Fourteenth Amendments' guarantee of freedom of the person from cruel or unusual punishment, stating "[drug addiction] . . . is apparently an illness which may be contracted innocently or involuntarily"); *but see, Powell v. Texas*, 392 U.S. 514, 517 (1968) (state law punishing a person who shall "get drunk or be found in a state of intoxication in any public place" held not to violate Eighth and Fourteenth Amendments as cruel or unusual punishment, because of the distinct problems associated with public drunkenness); and *see, Perkins v. North Carolina*, 234 F.Supp. 333 (W.D.N.C. 1964) (upholding five-to-sixty year sentence for homosexual conduct, making distinction between status and acts of the homosexual). If the homosexual is as helpless to prevent himself from engaging in sex with another of the same gender as an alcoholic or drug addict is to keep from consuming the addictive substance, then *Perkins* was wrongly decided and this Court should dispose of cases involving criminal penalties for homosexuality in the same way as it disposed of cases penalizing drug addiction and alcoholism; where there is not independent

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analogy disfavors lesbians and gay men, in policy terms, in that, unlike drug addiction and alcoholism, homosexuality is not a disease, defect or sexual deviation, medically and psychologically speaking.[47] Assuming *arguendo* that homosexuality is chosen, to punish its adherents and practitioners is comparable to punishing the adherents and practitioners of an unpopular religious faith. Such punishment strikes a strong blow to the historical heart of the U.S. Constitution and Bill of Rights.[48] In sum, the

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basis for criminalization, as there was found to be in *Powell v. Texas* in the fact that public drunkenness posed special law enforcement difficulties, the punishment of a person for a condition or status that she/he is helpless to avert is cruel and unusual, and denies equal protection *vis a vis* heterosexuals.

[47] As of 1973, the American Psychiatric Association determined that homosexuality is neither a mental illness nor a form of sexual deviation. *See* American Psychiatric Association *D.S.M. III: Diagnostic and Statistical Manual of Mental Disorders* 281-82, 380 (3d ed. 1980). See discussion of these changes in *Hill v. Immigration and Naturalization Service*, 714 F.2d 1470, 1472 and n. 3 thereof (9th Cir. 1983) ("[A]ccording to 'current and generally accepted canons of medical practice,' homosexuality *per se* is no longer considered to be a mental disorder" (footnote omitted)). Further, it is important to not that there is no such thing as a homosexual personality or character structure. The diversity within the homosexual community is as great as within the heterosexual community. Benedek, P., M.D. and Schetky, D., M.D., eds., *Emerging Issues in Child Psychiatry and the Law*, Chapter on "Lesbian Mothers/Gay Fathers" by Kirkpatrick, M., M.D. and Hitchens, D. J., J.D. Moreover, there is no evidence that homosexuals as a group are more neurotic, unhappy, or psychologically maladjusted than heterosexuals matched for living similar lives. *See* Bell, A. & Weinberg, M. *Homosexualities: A Study of Diversity Among Men and Women*, (1978).

[48] Historian J. R. Pole aptly has summarized the development of religious freedoms under the U.S. Constitution as follows: "The concept of equality of conscience, which began as a claim for equal treatment between warring sects thus ends by forming a perfect unity with the political equality of individuals. Whatever an individual's heritage, convictons or assocations, the government's only legitimate knowledge of him or her is as the sovereign possessor of autonomous moral being." J. R. Pole, *The Pursuit of Equality In American History* 111 (1978).

constitutional right to privacy no more can be denied to gay and lesbian persons based on the ascription of their status than it can be withheld on the basis that gay persons choose to be gay. In this regard, it should be noted that some of the situations involving exercises of privacy held protected by this Court may be said to concern ascribed statuses beyond the person's control (e.g. minority[49] and fertility[50]), while others may be said to concern statuses or situations chosen by the person claiming the protection of constitutional privacy (eg. criminal conviction[51], interest in prurient literature[52], and unmarried status[53]). Plainly, whether homosexuality is dictated by external forces or chosen by the person, (or both), cannot determine whether privacy should be afforded to the homosexual person.

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CONCLUSION

There are those who would contend that this Court need neither hear nor give reasons in order to uphold the prerogative of Georgia to criminally proscribe practices that have been the subject of proscription and penalties in various cultures for centuries. Their argument, that reason need not govern the process of this Court in deciding this case, has already been made by no less a champion of the criminalization of homosexuality than Lord Patrick Devlin, to whom H.L.A. Hart's definitive response deserves to be read in its entirety.[54] The most telling pas-

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[49] *Carey* v. *Population Services International*, cited at note 6, *supra*.

[50] *Roe* v. *Wade*, *Griswold* v. *Connecticut* and *Eisenstadt* v. *Baird*, cited at note 6, *supra*.

[51] *Skinner* v. *Oklahoma*, cited at note 6, *supra*.

[52] *Stanley* v. *Georgia*, cited at note 6, *supra*.

[53] *Eisenstadt* v. *Baird*, cited at note 6, *supra*.

[54] H.L.A. Hart, *Immorality and Treason*, 62 Listener 162-163 (July 30, 1959), reprinted in S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 18 (1st ed. 1969).

sage of Hart's response, in terms of the position that this Court need only act upon a gut response of moral repugnance toward homosexuality in order to strike down the assertion of a claim of privacy by respondents Hardwick *et al.*, is as follows:

> When Sir Patrick [Devlin's] lecture was first delivered The Times greeted it with these words: "There is a moving welcome humility in the conception that society should not be asked to give its reason for refusing to tolerate what in its heart it feels intolerable." This drew from a correspondent in Cambridge the retort: "I am afraid that we are less humble than we used to be. We once burnt old women because, without giving our reasons, we felt in our hearts that witchcraft was intolerable."
>
> This retore is a bitter one, yet its bitterness is salutary. We are not, I suppose, likely, in England, to take again to the burning of old women for witchcraft or to punishing people for associating with those of a different race or colour, or to punishing people again for adultery. Yet if these things were viewed with intolerance, indignation and disgust, as the second of them still is in some countries, it seems that on Sir Patrick's principles no rational criticism could be opposed to the claim that they should be punished by law. We could only pray, in his words, that the limits of tolerance might shift.[55]

In a government in which this Court must be the source of ultimate illumination of the guarantees of the U.S. Constitution, the responsibilities of this Court must sometimes seem onerous beyond description. More than once this Court has had to undo *de jure* discrimination enforced by prior decisions of this Court.[56] That represents

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[55] *Id.*

[56] Perhaps the most powerful example of this process is the matter of racial segregation, where this Court's decision of *Plessy v. Ferguson*, 163 U.S. 537 (1896), announcing "separate but equal"

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an extremely delicate process, in that the undoing, if done incautiously or callously, can undo the respect and authority of the Court itself in the process. Blessedly, in this case, this Court has ample information by which to be guided away from the course of ratification of ignorant bigotory that was taken in decision such as *Bradwell v. State*, *Plessy v. Ferguson* and *Korematsu v. United States*.[57] If this Court can see its way clear to uphold th fundamental right to privacy of persons including gay men,

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and holding it constitutional, took decades of hard labor including the work of this Court itself to undo, and still requires effort by this Court and the people of this country to undo. R. Kluger, *Simple Justice*, *passim* (1977). Likewise, the ratification of *de jure* discrimination against women based upon "natural law" inferiority of the female, in the case of *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873), has left a legacy and heritage of discrimination that this Court has been busy repairing since at least *Reed v. Reed*, 404 U.S. 71 (1971). The forcible internment of Japanese-Americans during World War II, upheld by this Court in *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943) (curfew upheld) is currently the subject of legal efforts at repair, *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). As to this example of a Supreme Court decision leading to discrimination the harm of which the courts, decades later, have been called upon and have determined it necessary to repair, the most memorable statement perhaps is that of the late Justice Earl Warren, who has written in his memoirs, ". . . I testified for a proposal which was not to intern in concentration camps *all* Japanese, but to require them to move from what was designated as the theater of operations, extending seven hundred and fifty miles inland from the Pacific Ocean. Those who did not move were to be confined to concentration camps established by the United States Government . . . I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to react so impulsively without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. . ." *The Memoirs of Chief Justice Earl Warren* 148-149 (1977) (emphasis in original).

[57] *See* citations at note 56, *supra*.

lesbians and bisexual persons to make decisions about private, consenting adult sexual activity, at this stage in our constitutional and legal progress, there will not need to be the extreme extent of agonizing and delicate undoing of rampant *de jure* discrimination and mistreatment, as to these sexual minorities, that has had to be and that continues to have to be done, by this Court and by this nation, as to women and people of color.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
Attorney General of Georgia,
Petitioner,
v.

MICHAEL HARDWICK, and JOHN and MARY DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND AMERICAN PUBLIC HEALTH ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND AMERICAN PUBLIC HEALTH ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The American Psychological Association (hereafter "APA"), a nonprofit, scientific, and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major functions are promoting psychological research, improving research methods, and promulgating information regarding human psychological behavior. A substantial number of APA's members are concerned with the collection of data, development of research, and provision of therapy pertaining to human sexuality.

The American Public Health Association (hereafter "APHA") was founded in 1872 for the purposes of improving public health and the quality of health care. Together with its affiliated associations, APHA is the largest public health association in the world, with a combined multidisciplinary membership of approximately 50,000 physicians, nurses, immunologists, administrators, laboratory scientists, educators, biomedical researchers, and other health care professionals. By resolution, APHA supports the repeal of laws criminalizing private consensual sexual conduct, saving only those portions that protect children and other helpless persons. Because APHA has not adopted policy on certain mental health aspects of homosexuality, it takes no position with respect to Parts I-B and II-B of this brief. APHA is particularly able to address the absence of a public health rationale to support the statute at issue.

Petitioner and respondents have both consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Georgia's official code, O.C.G.A. § 16-6-2 (1984), criminalizes certain noncommercial, nonviolent sexual conduct between consenting adults, whether married or not, even if—as in this case—it takes place in the privacy of one's own bedroom. This case poses the question whether this statute, by intruding upon extremely intimate and private aspects of human life and personality, infringes fundamental human rights.

In answering this question, this Court should consider scientific, demographic, and clinical information concerning the intimate conduct made criminal by the statute. Despite some people's moral or theological objections to oral or anal sex, this conduct is extremely common among married and unmarried heterosexuals and homosexuals. Mental health professionals have found that the sexual conduct prohibited by Georgia is *not* harmful to health or social functioning, whether engaged in by persons of different sexes or the same sex. Clinical research also indicates that the freedom to engage in such conduct is important to the psychological health of individuals and of their most intimate and profound relationships. Like the decision whether to use contraceptives, the decision with whom and whether one will engage in these types of nonprocreative sexual conduct is among "the most private and sensitive" of decisions, concerning "the most intimate of human activities and relationships." *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977). For these reasons, the statute violates the fundamental constitutional right of personal privacy. Point I.

Based on scientific and clinical data, *amici* also respectfully submit that the Georgia statute does *not* fur-

ther individual mental health or the public health. Indeed, in several ways, the statute actually disserves these goals. First, the Georgia statute does not contribute to combating the spread of acquired immunodeficiency syndrome (AIDS) or to achieving other public health goals. The statute adds nothing to the deterrent effect already created by the disease itself against conduct that *does* pose a risk of spreading AIDS. Moreover, for the overwhelming majority of people who violate the statute, deterring the proscribed conduct—even if the statute had this effect—would have virtually no impact on transmission of the disease. The threat of prosecution actually *harms* the public health effort by driving the disease underground where it is more difficult to study and contain and by impeding the flow of information about prevention from public health experts to the population at risk. Second, the statute contributes nothing to improving or safeguarding individual mental health. Because neither homosexuality nor the prohibited sexual conduct is pathological in and of itself, preventing the development of homosexuality and deterring the prohibited conduct cannot be defended as mental health goals, even if the statute had such effects (which it does not). The threat of criminal punishment actually has harmful psychological consequences for people who wish to engage in the proscribed conduct. Point II.

Amici respectfully urge this Court to affirm the Eleventh Circuit's decision in this case.

ARGUMENT

I. THE GEORGIA STATUTE IMPLICATES FUNDAMENTAL PRIVACY INTERESTS THAT ARE BASIC TO MARITAL RELATIONSHIPS AND TO NONMARITAL HETEROSEXUAL AND HOMOSEXUAL RELATIONSHIPS.

In *Carey v. Population Services Int'l*, this Court observed that it has not answered "the difficult question whether and to what extent" the Constitution prohibits

state statutes regulating "private consensual sexual behavior" among adults. 431 U.S. at 694, n. 17. In this case, the Court confronts a limited aspect of this issue: whether the constitutional right of personal privacy encompasses the right to engage in certain very common, nonpathological types of nonprocreative, consensual sexual conduct with another adult in the privacy of the home.[1] Respondent's claim to constitutional protection is particularly strong, because the statute intrudes upon two legally and psychologically distinct aspects of his privacy. First, the statute intrudes upon his independence in making "the most private and sensitive" decisions affecting "the most intimate of human activities and relationships." *Id.* at 685. Second, the statute invades his home, where an individual's expectation of territorial privacy is greatest. *E.g.*, *Payton v. New York*, 445 U.S. 573, 589 (1980).[2]

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[1] Not at issue, therefore, is the constitutional status of engaging in the conduct proscribed by the Georgia statute, or any other type of sexual conduct, in a location where one has a lesser expectation of privacy than the home, or for commercial purposes, or coercively, or with a minor.

[2] Researchers have observed both of these aspects of privacy. "Psychological privacy serves . . . to permit the individual to feel free to behave in a particular manner or to increase his range of options by removing certain classes of social constraints." Proshansky, Ittleson & Rivlin, *Freedom of Choice and Behavior in a Physical Setting*, in ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 176 (Proshansky *et al.* eds. 1970). Privacy in the sense of controlling access to personal territory, such as the home, is very important to an individual's "selective control over access to the self or to one's group," Altman, *Privacy: A Conceptual Analysis*, in 6 MAN-ENVIRONMENT INTERACTIONS: EVALUATIONS AND APPLICATIONS, Pt. II, p. 6 (Carson *et al. eds.* 1974), as well as to a sense of well-being. *See, e.g.*, Vinsel, Brown, Altman & Foss, *Privacy Regulation, Territorial Displays, and Effectiveness of Individual Functioning*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 1104 (1980).

A. The Georgia Statute Prohibits and Criminally Punishes Sexual Conduct that Is Common and Not Psychologically Harmful.

1. *The specific sexual conduct prohibited by the Georgia statute is common in marital relationships, and in nonmarital heterosexual and homosexual relationships.*

In 1948, Kinsey estimated that if the then extant criminal laws forbidding various sex acts were enforced, 95% of all white American males would be subject to prosecution.[3] Today, it is safe to conclude that a vast majority of all adult Americans—men and women, married and unmarried, heterosexual and homosexual—have engaged in the intimate conduct made felonious by Georgia.

Statistical studies show that the sexual conduct criminalized by Georgia is commonplace among predominantly heterosexual people. Kinsey's data show that, as of the early 1950s, 54% of exclusively or predominantly heterosexual men and 49% of exclusively or predominantly heterosexual women engaged frequently in oral or anal sex.[4] Kinsey also reported that 60% of married, college-educated people engaged in oral sex on a fairly regular basis.[5] A major study of couples in the United States published in 1983 found that 90% of the married and unmarried heterosexual couples studied had engaged in fellatio and that 93% of these couples had engaged in cunnilingus.[6] Other recent surveys similarly report that

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[3] A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 390-93 (1948) [hereafter KINSEY 1948].

[4] A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953) [hereafter KINSEY 1953]; KINSEY 1948, *supra* note 3, at 368-70.

[5] *Id.*

[6] P. BLUMSTEIN AND P. SCHWARTZ, AMERICAN COUPLES 236 (1983) [hereafter BLUMSTEIN & SCHWARTZ]. This national study of 12,000 people compared married couples, unmarried heterosexual couples, gay male couples, and lesbian couples currently living together. The researchers also reported that 72% of married and

80-90% of all married couples engage in oral sex.[7]

Studies also demonstrate that oral-genital sex is a basic component of heterosexual relations in the United States among substantial percentages of married and unmarried adults of every age. One recent study found that approximately 80% of single men and women aged 25-34 have engaged in oral-genital sex.[8] Another recent major study reported that, after reaching the age of 50, 43% of women and 49% of men had engaged in fellatio, and 49% of women and 56% of men had engaged in cunnilingus.[9]

Fewer data exist on the incidence of anal intercourse between women and men. One researcher found that 25% of married couples under 35 years old had engaged in anal intercourse in the year preceding the study.[10] Another study found that 16% of heterosexual men and women reported having had their anus stimulated during sex after reaching the age of 50.[11]

Reliable data on the incidence of homosexual orientation are difficult to obtain due to the criminal penalties and social stigma attached to homosexual behavior and the consequent difficulty of obtaining representative samples of people to study. A recent report conservatively

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unmarried heterosexual couples engaged in fellatio, and 74% engaged in cunnilingus, every time they had sex, frequently, or sometimes. *Id.*

[7] *E.g.*, C. TAVRIS & S. SADD, THE REDBOOK REPORT ON FEMALE SEXUALITY (1977) [hereafter REDBOOK REPORT] (85% of married couples engaged in cunnilingus, and over 83% engaged in fellatio, often or occasionally); M. HUNT, SEXUAL BEHAVIOR IN THE SEVENTIES 198-99 (1974) (90% of married couples under 25 years old engaged in oral sex).

[8] M. HUNT, *supra* note 7.

[9] E. BRECHER, LOVE, SEX, AND AGING: A CONSUMER'S UNION REPORT 358-59 (1984) [hereafter LOVE, SEX, AND AGING].

[10] M. HUNT, *supra* note 7, at 204. 6% of the sample reported engaging in anal intercourse "sometimes" or "often."

[11] LOVE, SEX, AND AGING, *supra* note 9, at 363.

estimates that more than five million people in the United States are exclusively homosexual.[12] Another commentator suggests that the population of persons with a homosexual orientation is 25 million men and women.[13] The practices criminalized by the Georgia statute are primary aspects of sexual expression available to homosexual people.[14]

2. ***The sexual conduct criminalized by the statute is not, by itself, pathological or harmful to the individual or individual functioning, whether engaged in with a member of the opposite or the same sex.***

The sexual conduct prohibited by O.C.G.A. § 16-6-2 is not pathological; that is, it is not detrimental to an individual's happiness or functioning. The American Psychiatric Association's *Diagnostic and Statistical Manual*

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[12] R. FRANCOEUR, BECOMING A SEXUAL PERSON (1982). As used herein, "homosexual" refers to people who have a definite sexual orientation and emotional attraction to and engage in sexual conduct with persons of the same sex. Paul & Weinrich, *Whom and What We Study*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 23 (Paul *et al.* eds. 1982) [hereafter HOMOSEXUALITY] (Final report of the Task Force on Sexual Orientation of APA's Division 9 (The Society for the Psychological Study of Social Issues), a four-year national research and education project producing a comprehensive body of empirical evidence contributed by 22 authors and subjected to several independent reviews).

[13] Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument*, in HOMOSEXUALITY, *supra* note 12, at 25-26 (1982).

[14] One recent study reports that 89% of male couples and 77% of lesbian couples regularly engage in oral sex. Only 1% and 4% respectively reported never engaging in oral sex with their partners. BLUMSTEIN & SCHWARTZ, *supra* note 6, at 236. 17% of male couples and 12% of lesbian couples reported engaging in oral sex every time they had sexual relations. *Id.* 70% of male couples reported regularly engaging in anal intercourse. *Id.* at 243. Another major study, limited to male couples, found that about 95% of the sample reported engaging in fellatio and about 71% reported engaging in anal intercourse at some time during the preceding year. D. MCWHIRTER & A. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 277 (1984) [hereafter MCWHIRTER & MATTISON].

(Third Edition), used as an authoritative description of diagnostic categories of mental disorders by health care practitioners and the insurance industry, does not include in its catalogue of pathological sexual syndromes either oral or anal sex between persons of different sexes or the same sex.[15] Mental health clinicians have long observed that diverse expressions of sexual feelings between consenting adults are not symptoms of mental disorder, but rather of mental health. A recent study of public attitudes toward oral sex indicated that a substantial majority of Americans consider oral-genital contact to be "part of normal sex."[16] No significant data show that engaging in a variety of sexual expressions, including oral and anal sex, results in mental or physical dysfunction.[17] Indeed, *repression* of desires for such expression can lead to dysfunction and pathology.[18]

3. *Homosexuality is not a disorder.*

The vast majority of mental health professionals no longer consider homosexuality to be a disorder.[19] In

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[15] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 261-83 (3d ed. 1980) [hereafter DSM-III].

[16] Callan & Planco, *Attitudes Towards Oral-Genital Sexuality*, 42 CONN. MED. 500, 502 (1978) [hereafter Callan & Planco]. 91% of persons under 35, and 78% of all persons, said they consider oral sex to be normal.

[17] Mental problems *associated* with such sexual expression, whether engaged in by heterosexual or homosexual people, are usually the product of internalized social condemnation of those who practice it. Thus, the pathologies sometimes associated with variant sexual conduct can be viewed as social rather than personal pathologies. *See* Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, in HOMOSEXUALITY, *supra* note 12, 115-19 (1982).

[18] W. MASTERS & V. JOHNSON, HUMAN SEXUAL INADEQUACY (1970); *see* Coleman, *Developmental Stages of the Coming-Out Process*, in HOMOSEXUALITY, *supra* note 12, 150-51 (1982); P. FISHER, THE GAY MYSTIQUE, THE MYTH AND REALITY OF MALE HOMOSEXUALITY 249 (1972). *See* pp. 28-30, *infra*.

[19] A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that

1973, the American Psychiatric Association removed homosexuality from its list of mental disorders, declaring that "homosexuality *per se* implies no impairment in judgment, stability, reliability or general social or vocational capabilities," and concluded that "[i]n the reasoned judgment of most American psychiatrists today, homosexuality *per se* does not constitute any form of mental disease." [20] In 1975, *amici* APA and APHA passed resolutions supporting the Psychiatric Association's action and urging all mental health professionals to help dispel the stigma of mental illness that long had been associated with homosexual orientation.[21]

The declassification of homosexuality as a mental disease was the result of a long reevaluation of the "illness model" of homosexuality and was based on extensive scientific findings by a large number of independent researchers.[22] The first major challenge to the illness model

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is typically associated with either a painful symptom (distress) or impairment in one or more important areas of functioning (disability)." DSM-III, *supra* note 15, at 6.

[20] Resolution of the American Psychiatric Association, December 15, 1973. In part, DSM-III explains that "[a] significant proportion of homosexuals . . . show no significant signs of manifest psychopathology . . . and are able to function socially and occupationally with no impairment. If one uses the criteria of *distress* or *disability*, homosexuality *per se* is not a mental disorder." DSM-III, *supra* note 15, at 380 (emphasis in original). DSM-III lists "ego-dystonic homosexuality" as a mental disorder consisting of a desire of a homosexually behaving person to acquire or increase heterosexual arousal. *Id.* at 281. This is not an inevitable result of homosexual orientation, but is a condition suffered by only a small percentage of homosexuals, generally as a result of internalized social condemnation. *See* note 17, *supra*.

[21] Resolution of the Council of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975).

[22] According to *amicus* APA's Task Force on Sexual Orientation, the research that had supported the "illness model" of homosexuality was "influenced by poorly founded stereotypes and social prejudice." Weinrich, *Task Force Findings: Overview and Prospect*, in HOMOSEXUALITY, *supra* note 12, at 377 (1982).

came in 1957 when Dr. Evelyn Hooker determined that homosexual and heterosexual men could not be distinguished from each other on the basis of standard psychological tests, and that a similar majority of the two groups appeared to be free of psychopathology.[23] Of course, some homosexuals, like some heterosexuals, are psychologically disturbed. But extensive psychological research conducted over almost three decades has conclusively established that homosexuality is not related to psychological adjustment or maladjustment.[24] One commentator who has reviewed the extensive psychological literature on the subject concluded that "theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both." [25]

Moreover, cross-cultural studies reveal that homosexuality is widely practiced in a variety of societies around the world.[26] Anthropological and historical evidence re-

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[23] Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 17 (1957). Subsequent studies have replicated these findings with female samples. *See, e.g.*, M. FREEDMAN, HOMOSEXUALITY AND PSYCHOLOGICAL FUNCTIONING (1971).

[24] *See* Gonsiorek, *Results of Psychological Testing on Homosexual Populations*, 25 AM. BEHAVIORAL SCI. 385, 394 (1982) [hereafter *Psychological Testing*]; Reiss, *Psychological Tests in Homosexuality*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 296-311 (Marmor ed. 1980) [hereafter Reiss]; Hart, Roback, Tittler, Weitz, Walston & McKee, *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 J. CLINICAL PSYCHIATRY 604 (1978).

[25] *Psychological Testing*, *supra* note 24, at 394; *see* Reiss, *supra* n. 24, at 308. Although some researchers have postulated that homosexuality may result from a different hormonal constitution, a series of studies has failed to establish that homosexual people are characterized by abnormal hormone levels or other abnormal physiological characteristics. *See* Ricketts, *Biological Research on Homosexuality: Ansell's Cow or Occam's Razor?* 9 J. HOMOSEXUALITY 65 (1984); Meyer-Bahlberg, *Homosexual Orientation in Women and Men: A Hormonal Basis*, in THE PSYCHOBIOLOGY OF SEX DIFFERENCES AND SEX ROLES 105-130 (Parsons ed. 1980).

[26] Carrier, *Homosexual Behavior in Cross-Cultural Perspective*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 100-22 (Marmor

veals that homosexuality, and the proscribed forms of nonprocreative sexual expression, have been common in western societies since before the Christian era.[27] Homosexuality has been ubiquitous, whether a particular culture admired, ignored, or vilified it.[28] There is no evidence that the incidence of homosexuality increases or decreases significantly as a result of any particular constellation of cultural conditions.[29]

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ed. 1980); C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 143 (1951).

[27] Although the amount and modes of sexual activity at any time in history are difficult to ascertain, the victory of Christian doctrine may have led to the repression of the freer sexual attitudes of the Greeks and Romans. M. GOODICH, THE UNMENTIONABLE VICE: HOMOSEXUALTY IN THE LATER MEDIEVAL PERIOD x (1979). In the first thousand years of Christianity there was a considerable range of tolerance for homosexual conduct. J. BOSWELL, CHRISTIANITY, TOLERANCE & HOMOSEXUALITY, chs. 1 & 2 (1980). In the Thirteenth Century, however, St. Thomas Aquinas in effect defined homosexual conduct as more "unnatural" than other "unnatural" sex, such as masturbation, nonprocreative or nonmarital heterosexual conduct, and procreative heterosexual intercourse in other than the approved position. Gilbert, *Conceptions of Homosexuality and Sodomy in Western History*, 6 J. HOMOSEXUALITY 57, 62 (1981). Aquinas' hierarchy was first embodied in canon law, V. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY 380-81 (1976), and these ecclesiastical proscriptions later became part of the criminal codes or common law of England and other European countries. P. CONRAD & J. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS 172-79 (1980). What had been a sin became a crime. With the Eighteenth Century Age of Enlightenment, "science" constructed a concept of health based largely on earlier concepts of morality. Conduct regarded as morally excessive—such as oral and anal sex, masturbation, and other nonprocreative sexual activities—was believed to make extraordinary demands on the body and lead to disease. Homosexuality was viewed as pathological. *Id.* at 179-85. This transition from sin to crime to illness has now been reversed. The criminal laws of Georgia, however, are still based on the disproven, religiously based concept of "unnatural acts."

[28] *See* V. BULLOUGH, *supra* note 27; J. BOSWELL, *supra* note 27; Karlen, *Homosexuality in History*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 75-99 (Marmor ed. 1980).

[29] *Id.* Recent research has not indicated an increase in the incidence of homosexuality since the Kinsey studies were conducted

B. The Freedom to Express Intimacy through the Sexual Conduct Prohibited by the Georgia Statute Is Important to the Psychological Health of Individuals and Intimate Human Relationships.

This Court has recognized that the Constitution "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984). This right of private association is based on the fact that "individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.*

One such protected relationship is marriage, *see, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978), which is among the family relationships that, "by their very nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life," *Roberts v. United States Jaycees*, 104 S. Ct. at 3250. Because physical and sexual contact is basic to marital relationships, the Constitution protects this sexual intimacy from unreasonable state intrusion. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The Constitution protects the privacy and associational rights of the "*individual*, married or single," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original), and constitutional protection of marital in-

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over 30 years ago, despite greater tolerance for and awareness of homosexual lifestyles. *See* P. GEBHARD & A. JOHNSON, THE KINSEY DATA: MARGINAL TABULATION OF THE 1938-1963 INTERVIEWS CONDUCTED BY THE INSTITUTE FOR SEX RESEARCH (1979); Gebhard, *Incidence of Overt Homosexuality in the U.S. and Western Europe*, NIMH Task Force on Homosexuality, DHEW Pub. No. (HSM) 9116 (Livingood ed. 1972).

timacy is based upon the recognition that a marriage is an "association of two individuals each with a separate intellectual and emotional makeup." *Id.* Thus, constitutional protection of sexual intimacy is not limited to the marital relationship, *see Carey v. Population Services Int'l*, 431 U.S. at 686-87, but necessarily extends to other important, emotionally enriching associations in which sexuality plays a similarly intimate and central role.

1. *Marriage and the relationships of unmarried heterosexual couples and homosexual couples are psychologically important.*

The American family, and the American household, have changed more in the last 30 years than in the previous 250.[30] People are marrying less, marrying later, and divorcing more.[31] Researchers also note a marked increase in unmarried heterosexual cohabitation; between 1970 and 1981, the total of such households tripled. In 1981, there were approximately 1.8 million unmarried couples of the opposite sex living together in the United States.[32] Moreover, a high percentage of lesbians and gay men live with a partner. In the late 1960s, the Kinsey Institute found that 71% of its sample of gay men aged 36-45 were living with a partner.[33] Another study, done in the 1970s, found that 82% of the lesbians in the sample were currently living with someone.[34] A recent major study of married, cohabiting heterosexual, and gay couples in the United States concludes that

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[30] BLUMSTEIN & SCHWARTZ, *supra* note 6, at 25-45.

[31] *Id.* at 31, 33-34.

[32] *Id.* at 36; *see* Spanier, *Married and Unmarried Cohabitation in the United States: 1980*, 45 J. MARRIAGE & FAMILY 277 (1983).

[33] M. WEINBERG & C. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS (1974) [hereafter WEINBERG & WILLIAMS].

[34] A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978) [hereafter BELL & WEINBERG].

" '[c]ouplehood,' either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals." [35]

Recent social science research indicates that these nontraditional types of couples share principal elements of the marital relationship. Like married couples, unmarried heterosexual couples and homosexual couples form deep emotional "attachments and commitments," *Roberts v. United States Jaycees*, 104 S. Ct. at 3250, to each other.[36] All couples—whether married, unmarried heterosexual, gay male, or lesbian—confront a common set of issues, and confront them in similar ways. Principal concerns for all types of couples include equity, loyalty, stability, intimacy, and love.[37] The nontraditional couples also often make substantial commitments to each other and in many cases stay together for decades.[38]

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[35] BLUMSTEIN & SCHWARTZ, *supra* note 6, at 45; *see* Peplau, Padesky & Hamilton, *Satisfaction in Lesbian Relationships*, 8 J. HOMOSEXUALITY 23 (1982); Peplau & Cochran, *Value Orientations in the Intimate Relationships of Gay Men*, 6 J. HOMOSEXUALITY 1 (1981). Researchers found that gay male couples "form family units just as stable, dependable, and contributing to the commonwealth as any traditional nuclear family. Many participate actively in civic, church, neighborhood, and political life, most often alongside their nongay neighbors and friends. . . ." MCWHIRTER & MATTISON, *supra* note 14, at 286.

[36] *See* BLUMSTEIN & SCHWARTZ, *supra* note 6, at 170-174, 332-545; BELL & WEINBERG, *supra* note 34; Peplau, *Research on Homosexual Couples: An Overview*, 8 J. HOMOSEXUALITY 3, 5 (1982) [hereafter Peplau]; Peplau, Padesky & Hamilton, *supra* note 35, at 27-28, 34-35; Larson, *Gay Male Relationships*, in HOMOSEXUALTY, *supra* note 12, at 223-25 (1982); Peplau & Amaro, *Understanding Lesbian Relationships*, in HOMOSEXUALITY, *supra* note 12, at 233-47 (1982); Peplau & Cochran, *supra* note 35.

[37] *See generally* MCWHIRTER & MATTISON, *supra* note 14; BLUMSTEIN & SCHWARTZ, *supra* note 6; Peplau & Amaro, *supra* note 36, at 237-39; Peplau, *supra* note 36, at 4-5; Cardell, Finn & Marecek, *Sex-Role Identity, Sex Role Behavior, and Satisfaction in Heterosexual, Lesbian and Gay Male Couples*, 5 PSYCHOLOGY OF WOMEN Q. 488 (1981).

[38] *See, e.g.*, MCWHIRTER & MATTISON, *supra* note 14, at 285-86; Peplau, *supra* note 36, at 4.

Sexuality is an important element in the lives and relationships of all four types of couples. For all four kinds of couples, sex functions as a complex bond between the partners, and for all "a good sex life is central to a good overall relationship." [39] Married or not, heterosexual or homosexual, "[h]aving sex is an act that is rarely devoid of larger meaning for a couple. It always says something about partners' feelings about each other, what kind of values they share, and the purpose of their relationship." [40] As discussed, oral sex and other sexual acts other than vaginal intercourse are common for all four types of couples. In short, there are great similarities among homosexual and heterosexual couples—in emotional makeup, significance of the relationship to the individual, and in the role sexuality plays in the relationship.

2. *The sexual conduct prohibited by the Georgia statute is important to the psychological health of many individuals and their basic human relationships.*

As noted, oral and anal intercourse are not harmful or pathological. In fact, they substantially benefit many people, both heterosexuals and homosexuals, and many relationships. Married men who engage in oral sex with their wives are happier with their sex lives and more satisfied with their relationships in general than those who do not. The same is true for men in unmarried heterosexual couples. Lesbian and gay male couples who engage in oral sex are also happier than those who do not.[41] Homosexual people also benefit by engaging in behavior that affirms their self-concept, provides emotional satisfaction, and

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[39] BLUMSTEIN & SCHWARTZ, *supra* note 6, at 201, 205-06; *see* MCWHIRTER & MATTISON, *supra* note 14, at 262.

[40] BLUMSTEIN & SCHWARTZ, *supra* note 6, at 193.

[41] *Id.* at 231 (married and unmarried heterosexual couples); *id.* at 239-240 (lesbians and gay male couples). Only for heterosexual women does engaging in oral sex not correlate—positively or negatively—with happiness in the relationship. *Id.* at 233-37.

allows the formation of long-term bonds.[42] Indeed, a majority of Americans sampled in a 1978 study agreed that "oral-genital sex leads to better and happier relationships." [43]

These findings are not surprising. The theme of sexual flexibility appears throughout the scientific literature on sex therapy. Virtually every expert in the field has recognized the importance of sexual contact through behaviors other than vaginal intercourse. Underlying Masters and Johnson's once-innovative sex therapy was the theme of abstinence from intercourse and use of "sensate focus" exercises to expand a couple's sensitivity and sexual repertoire.[44] Oral and anal sexuality also are a significant source of sexual pleasure for a large majority of participants of both sexes and all ages.[45]

The many practitioners in sex therapy also work from the assumptions that reliance on vaginal intercourse as a sole sexual activity is not healthy, and that couples need to expand their behavior options. Oral-genital contact, in particular, has been recommended for inorgasmic women, because only a minority of women respond orgasmically

[42] McWhirter & Mattison, *supra* note 14, at 262; Bell & Weinberg, *supra* note 34, at 217-18; Peplau, *What Homosexuals Want in Relationships*, 15 Psychology Today 28 (1981).

[43] Callan and Planco, *supra* note 16, at 502.

[44] W. Masters & V. Johnson, Human Sexual Inadequacy (1970); W. Masters & V. Johnson, Human Sexual Response (1966).

[45] *See* Love, Sex, And Aging, *supra* note 9, at 358-59, 363 (98% of men and 75% of women over 50 who have experienced fellatio enjoyed it; 82% of women and 95% of men over 50 who have experienced cunnilingus enjoyed it; 86% of men and 67% of women who have been anally stimulated during sex since reaching the age of 50 enjoyed it); Redbook Report, *supra* note 7 (82% of wives reported they enjoyed cunnilingus; 65% of wives reported they enjoyed fellatio); S. Hite, The Hite Report: A Nationwide Study On Female Sexuality 76 (1976) (30% of female sample said they enjoyed anal intercourse).

to intercourse without other stimulation.[46] Human sexuality texts consistently support the concept of sexual conduct other than conventional intercourse to enhance sexual functioning and health.[47] Persons experiencing sexual dysfunction benefit from therapy that requires the use of non-coital sexual techniques.[48] These techniques improve mental health by increasing feelings of sexual competence, intimacy, and self-esteem. Even among married couples seeking fertility counseling and wanting to reproduce, behaviors other than vaginal intercourse are commonly recommended as a way to ease the pressure and perhaps increase sexual arousal and frequency of orgasm, which is known to increase the probability of conception in women.[49]

The Georgia statute invades fundamental privacy interests in yet another way: it deprives heterosexual couples who do not desire to produce a pregnancy of the opportunity to engage in non-coital sexual behavior in addition to, or instead of, using contraception. *See Carey v. Population Services Int'l*, 431 U.S. 678; *Eisenstadt v. Baird*, 405 U.S. 438; *Griswold v. Connecticut*, 381 U.S. 479.

For these reasons, the effect of the Georgia statute is to deprive all couples of options that may—and in many cases do—enhance the quality of their lives and their most intimate relationships.

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[46] L. BARBACH, FOR YOURSELF, THE FULFILLMENT OF FEMALE SEXUALITY (1975) [hereafter L. BARBACH].

[47] *See, e.g.*, R. KOLODNY, W. MASTERS & V. JOHNSON, TEXTBOOK ON SEXUAL MEDICINE (1979) [hereafter R. KOLODNY, *et al.*]; MCCARY, MCCARY'S HUMAN SEXUALITY (1978); H. KATCHEDOURIAN & D. LUNDE, FUNDAMENTALS OF HUMAN SEXUALITY (1975).

[48] L. BARBACH, *supra* note 46; *see* W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 208-09 (1979) (functional failure rates for sexually experienced men and women are four times higher for coition than for fellatio or cunnilingus).

[49] *E.g.*, J. GAGNON, HUMAN SEXUALITIES 131, 193-214 (1977).

3. For many disabled heterosexual people the prohibited conduct may be among the only available kinds of intimate sexual contact.

Heterosexual people who are unable to engage in vaginal intercourse because of physical disability or handicap also benefit from the intimate contact that is provided by non-coital sexual behavior. Such individuals are encouraged by their therapists and rehabilitation specialists to use such behaviors as oral and anal stimulation to ensure the continuation of a pleasurable physical relationship with their loved ones. Such contact, in fact, has been shown to be a crucial determinant of survival itself for certain patients who may not be able to have intercourse and would otherwise terminate physical contact relationships.[50] Moreover, physically disabled men and women who achieve a level of sexual functioning that is personally satisfying will usually develop the self-confidence and assertiveness necessary to form meaningful relationships, to develop work skills, and to be otherwise productive.[51] The range of disabilities that may interfere with conventional vaginal intercourse is substantial.[52] The Georgia statute has

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[50] J. LYNCH, THE BROKEN HEART: THE MEDICAL CONSEQUENCES OF LONELINESS (1977).

[51] Cole, *Sex and the Paraplegic*, MED. WORLD NEWS 35 (January 17, 1972). The development of an adequate self-image may be a central element in total habilitation and rehabilitation. Weiss & Diamond, *Sexual Adjustment, Identification, and Attitudes of Patients with Myelopathy*, 47 ARCHIVES OF PHYSICAL MED. & REHABILIATION 245 (1966); Lindner, *Perceptual Sensitization to Sexual Phenomena in the Chronic Physically Handicapped*, 9 J. CLINICAL PSYCHOLOGY 67 (1953).

[52] For example, many people with significant medical problems or physical disabilities are unable to participate in intercourse due to organic erectile dysfunction, pain, or surgical trauma to the genitals. R. KOLODNY, *et al.*, supra note 47. Some women may have pain with intercourse as a result of arthritis or dryness due to aging; others may have had cancer surgery that removed or greately constricted the vagina. Forms of sexual expression other than vaginal intercourse may, however, be pleasurable and satisfying to them. For some men, oral stimulation might be used to produce an erec-

the effect of making criminal the principal sexual activities available to such disabled people.

The conduct prohibited by the statute therefore forms an important part of extremely private and sensitive aspects of intimate human relationships in a majority of the households in this country. For homosexual couples, and for some disabled heterosexual couples, the prohibited forms of conduct are the primary means of sexual expression. For these reasons, the Eleventh Circuit correctly decided that the Georgia statute infringes respondent's fundamental constitutional rights, and that the interests advanced by the State as justifying this intrusion must be subjected to heightened judicial scrutiny.

II. THE GEORGIA STATUTE DISSERVES THE LEGITIMATE OBJECTIVES OF IMPROVING THE PUBLIC HEALTH AND INDIVIDUAL MENTAL HEALTH.

The question whether and to what extent the statute serves any legitimate state objectives is not properly before this Court. These issues remain to be determined on remand. Nevertheless, one *amicus* brief supporting the State asserts erroneously that O.C.G.A. § 16-6-2 is justified as a health measure. Brief of David Robinson, Jr. *Amici* APHA and APA submit that this is simply not true.[53]

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tion or to facilitate orgasm. LOVE, SEX, AND AGING, *supra* note 9, at 359. Moreover, for some men with spinal cord injuries, stimulation of the penis during intercourse can result in automatic dysreflexia, which can be a life-threatening increase in blood pressure. It is absolutely necessary for these men to find other ways, such as with oral stimulation, to please their wives or partners. Lenz, *Becoming Active Partners: A Couple's Perspective*, in SEXUALITY AND PHYSICAL DISABILITY: PERSONAL PERSPECTIVES (Bullard *et al.* eds. 1981).

[53] The application of heightened scrutiny to protect individual privacy will not interfere with the operation of legitimate public health laws, which, unlike the law at issue, are narrowly drawn to meet specific problems of compelling importance. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

A. The Statute Is Not a Public Health Measure and Is Counterproductive to Public Health Goals.

1. *The statute does not significantly contribute to combating the spread of acquired immunodeficiency syndrome (AIDS) or to any other public health goal.*

The State cannot seriously contend that the statute is justified generally as advancing the public health or specifically as combating acquired immunodeficiency syndrome ("AIDS") or any other sexually transmitted disease. The statute was enacted in 1816, long before AIDS was known.[54] Its purpose, as the State concedes, was to perpetuate in Georgia the English common law's harsh moral condemnation of the specified sexual conduct, including male homosexuality. Any claim that the statute is justified as protecting the public or individual health is a transparent and unfounded *post-hoc* attempt to capitalize on the current climate of fear about AIDS.

The statute's lack of public health rationale can be seen first by the very loose relationship between its prohibitions and the health problems that Georgia and *amicus* Robinson assert it addresses. The viral agent associated with AIDS appears to be transmitted through exchange of semen or blood, as can occur during anal intercourse and fellatio.[55] But the statute prohibits *all* oral-genital

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[54] Medical description in the United States of what has come to be known as AIDS dates from 1981. *Pneumocystic Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WEEKLY REP. 250 (June 5, 1981), *reprinted in* Public Health Service, Department of Health and Human Services, *Reports on AIDS Published in the Morbidity and Mortality Weekly Report June 1981 through September 1985* 1 (1985) [hereafter MMWR REPORTS].

[55] *Recommendations for Preventing Transmission of Infection With Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 682 (Nov. 15, 1985); Krim, *AIDS: The Challenge to Medicine and Science*, in AIDS: THE EMERGING ETHICAL DILEMMAS: A HASTING CENTER REPORT SPECIAL SUPPLEMENT 2, 4 (1985). Ongoing research has identified a virus (HTLV-III/LAV) that is "believed to be a necessary factor in both the etiology and

sexuality, and there is no evidence that AIDS is communicated through heterosexual or lesbian cunnilingus. Moreover, those heterosexuals who have been exposed to AIDS can transmit the virus through vaginal intercourse as well as through some types of conduct forbidden by Georgia.[56] Thus, even to the extent heterosexuals are at risk, deterring the prohibited conduct has minimal impact on heterosexual transmission of AIDS.

As applied to homosexual behavior, the Georgia statute is also overly broad. Lesbians as a group are not at risk for AIDS. Among gay men, oral and anal sex are not inevitably associated with transmission of the virus, even when one gay male partner has been exposed. Use of a condom during oral or anal intercourse greatly reduces the risk of transmission of the AIDS virus.[57]

Most important, given what we know about the fundamental nature and strength of the sex drive in humans, it is unrealistic to think that fear of criminal sanction will effectively deter forbidden sexual conduct in private between consenting adults. If the risk of contracting AIDS, a fatal and thus far incurable disease, to say nothing of the threat of social ostracism, humiliation, and loss of job and friends, does not deter variant sexual conduct, then surely the very slim possibility of arrest and

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pathogenesis of AIDS. [C]ertain factors in addition to infection with [HTLV-III/LAV] could play a role in the development of AIDS." *Id.*

[56] *See, e.g., Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 561 (Sept. 20, 1985), *reprinted in* MMWR REPORTS at 112 [hereafter *Heterosexual Transmission*].

[57] *See Heterosexual Transmission, supra* note 56, in MMWR REPORTS at 113; *Questions and Answers*, 252 J. AM. MED. A. 826 (1984). Condoms appears to be effective, so long as they do not rupture. The as-yet unpublished results of research conducted at the University of California indicate that the AIDS virus cannot penetrate the fine membranes of condoms. *Condoms Found Effective*, New York Times Nat'l Ed., Dec. 19, 1985, at 13.

prosecution for private conduct does not do so.[58] The experience of the many jurisdictions in which consensual sexual conduct is not criminal seems to be that the prevalence of homosexuality is about the same as in jurisdictions in which it is illegal.[59] Thus, consensual sodomy laws deter at most a negligible amount of overt homosexual behavior.[60] As a result, even with respect to that subset of sexual conduct prohibited by the statute that does pose a risk of spreading AIDS, the statute has no beneficial public health effect.

2. The statute disserves the public health.

The statute does not deter conduct that spreads AIDS, but it may deter conduct essential to combating it. The achievement of the public health goals of health maintenance, disease prevention, and disease detection and treatment depends upon the cooperation of many individuals, including patients, physicians, hospital personnel, researchers, and government officials. To make sound decisions about individual treatment and public health, both individual physicians and public health personnel must be able to obtain accurate information. Criminal statutes such as Georgia's can seriously undermine these essential public health strategies by causing individuals to conceal or distort relevant information and by inhibiting effective public education efforts. In the case of sexually transmitted diseases such as AIDS, substantial harm to individuals and the public may result. Indeed, researchers have discovered that societies with harsh penalties for homosexual conduct suffer from poorer reporting and treatment of sexually transmitted diseases among homosexuals than more lenient societies.[61]

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[58] *See State v. Saunders*, 75 N.J. 200, 381 A.2d 333, 341-42 (1977) (criminal penalties add no deterrent force to fear of contracting serious illness).

[59] *See* WEINBERG & WILLIAMS, *supra* note 33.

[60] *See* Kimmel, *Psychotherapy and the Older Gay Man*, 14 PSYCHOTHERAPY: THEORY, RESEARCH & PRACTICE 386 (1977).

[61] Ostrow & Altman, *Sexually Transmitted Diseases and Homosexuality*, 10 SEXUALLY TRANSMITTED DISEASES 208, 212 (1983).

a. *The statute may adversely affect the health and treatment of individuals.*

Fearing both social disapproval and legal penalties, many homosexual men and women do not tell their personal physicians about their sexual orientation.[62] A patient runs the risk that members of a physician's or hospital's staff may make accidental or unauthorized disclosure of his or her sexual orientation. Such disclosure presents a risk of prosecution, as well as of intensified discrimination.[63] This concealment may adversely affect the medical care an individual receives,[64] with potentially serious consequences for the individual whose illness is misdiagnosed for some period of time. Fear of punitive government actions also can lead to failure to seek treatment at all. Thus, some people who have been exposed to AIDS may avoid reporting their own exposure fearing that their report may lead to criminal prosecution.[65]

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[62] *See, e.g.*, Dardick & Grady, *Openness Between Gay Persons and Health Professionals*, 93 ANNALS OF INTERNAL MED. 115 (Pt. 1 1980).

[63] *See State v. Saunders*, 381 A.2d at 342 (a criminal statute "operates as a deterrent to . . . voluntary participation" in treatment programs).

[64] For example, physicians may not include in their list of possible diagnoses certain conditions that appear in homosexual men. *See* William, *The Sexual Transmission of Parasitic Infections in Gay Men*, 5 J. HOMOSEXUALITY 291 (1980).

[65] A clear analogy is provided by the effects of the U.S. Army's venereal disease policy during World War I. American soldiers in Europe were subject to court martial if they were diagnosed as having contracted a venereal disease. A. BRANDT, NO MAGIC BULLET 102 (1985). Many military physicians believed that the threat of court martial induced soldiers to conceal their illness for as long as possible. *Id.* at 102, n. 20, 103-05. But the threat of court martial certainly did not prevent the contraction of venereal diseases: more than 380,000 soldiers were diagnosed as having a venereal disease during the period from April 1917 to December 1919. *Id.* at 115.

b. *The statute may adversely affect scientific investigation directed toward containing disease and finding a cure.*

The process of understanding and controlling newly identified diseases such as AIDS urgently requires prompt gathering of accurate information. Diagnosis of individual cases, identification of relevant attributes of the population, finding individuals who may be unknowing or unreported sources of infection, and testing of hypotheses about the origin and spread of a disease, all depend on careful collection of data.[66] A statutory scheme that creates a realistic fear of punishment if certain behavior is disclosed runs the risk of obscuring important data, as individuals simply refuse to volunteer for studies or provide needed information, and of creating false data, as individuals try to conform what they reveal to what they believe is legal. Thus, people who, due to incomplete disclosure, are wrongly diagnosed may continue to be sources of infection without knowing it. Others, who fail to report early symptoms or their own exposure to the disease, also may spread it. Moreover, the public health technique of treating people with whom the patient has had sexual contact requires "the patient's cooperation . . . by assuring that each [contact] is promptly referred, evaluated and given any indicated therapeutic or preventive treatment."[67] The prospect of criminal penalties against themselves and their partner may well deter individuals from making such referrals. A punitive scheme like Georgia's may also inhibit health care professionals from fulfilling the important public health role of passing on relevant information about the incidence of a disease to researchers and public health officials. Historically, such forces have interfered substantially with efforts to control other forms of venereal disease.[68]

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[66] *See* J. MAUSNER AND S. KRAMER, MAUSNER & BAHN'S EPIDEMIOLGY—AN INTRODUCTORY TEXT 287-89 (2d ed. 1985).

[67] *1985 STD Treatment Guidelines*, 34 MORBIDITY & MORTALITY WEEKLY REP. 1085 (Oct. 18, 1985).

[68] Early in the century, for example, many private physicians believed that they would be violating their duty to their patients if

The short history of AIDS shows that fear of punishment has already hindered the current investigation. With respect to at least two important issues—the existence of potentially high risk to recent immigrants from Haiti,[69] and the transmissibility of the AIDS virus from women to men [70]—there is reason to believe that falsifications of information, caused by fear of punishment, have distorted the epidemiological picture. Finding these and other crucial pieces of the AIDS puzzle should not have to depend on the ability of epidemiologists to guess whether patients are not telling the truth because they fear being punished.

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they reported syphilis cases. A. BRANDT, *supra* note 65, at 43, 183-84. Non-reporting by physicians has persisted, frustrating public health efforts to control syphilis and gonorrhea. *Id.* at 46.

[69] Initial attempts to analyze the incidence of AIDS identified Haitians who had recently arrived in the United States as a high risk group "having neither a history of homosexuality nor a history of drug abuse." *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 MORBIDITY & MORTALITY WEEKLY REP. 507, 511 (Sept. 24, 1982), *reprinted in* MMWR REPORTS at 12. The current view of the Centers for Disease Control, however, is that Haitians are *not* members of a discrete risk group. *Update: Acquired Immunodeficiency Syndrome—United States*, 34 MORBIDITY & MORTALITY WEEKLY REP. 245 (May 10, 1985), *reprinted in* MMWR REPORTS at 907. One explanation for epidemiologists' failure to identify an overlap between the Haitians and other identified high-risk groups, such as homosexual men and intravenous drug users, is that many Haitian patients were afraid to tell investigators the truth. Admitting to illegal behavior in one's new country—and thereby risking deportation—may have seemed too great a risk to take simply to provide information to doctors.

[70] A study of military personnel done at Walter Reed Army Medical Center shows a much higher incidence of female-to-male transmission of HTLV-III/LAV virus than most other United States reports. *Compare* Redfield, Markham, Salahuddin, Wright, Sarngadharan & Gallo, *Heterosexually Acquired HTLV-III/LAV Disease (AIDS Related Complex and AIDS)*, 254 J. AM. MED. A. 2094 (1985) *with Heterosexual Transmission*, *supra* note 56. The question of the incidence of female-to-male transmission is an important area of current inquiry. It is possible that the other reports show an artificially low incidence of such transmission. But another explanation for the disparity is that the military personnel in the

c. *The statute interferes with health education efforts designed to encourage safer sexual practices.*

The statute also may harm the public health by interfering with efforts intended to advise the public how to minimize or avoid contracting the disease. Public health officials and private groups have been actively encouraging people to change to "safe sex" behavior.[71] "[T]he best chance of controlling the AIDS epidemic at present is through education and counseling to enhance behavioral change and personal responsibility."[72] Researchers report dramatic changes in sexual behavior to reduce the risk of AIDS in areas where major educational efforts are underway, demonstrating the urgent importance of such efforts.[73]

Such community effort and support are made more difficult in an environment in which a concomitant of participating in educational efforts is self-incrimination. Attending an educational presentation on "safe sex," for example, could be seen as an admission of engaging in

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Walter Reed study were reluctant to admit to homosexual activity or intravenous drug use, either of which could lead to discharge. *See, e.g., Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (Army discharge of homosexual man).

[71] As noted, the use of condoms during oral and anal sex is a preventive measure. Gay men can also engage in other, low risk types of sexual conduct, including, for example, kissing, hugging, body rubbing, and mutual masturbation. *See* McWHIRTER & MATTISON, *supra* note 14, at 276-77.

[72] Dr. James O. Mason, Acting Assistant Secretary for Health, Department of Health and Human Services, Testimony before the Republican Study Committee, House of Representatives (Nov. 7, 1985).

[73] *See, e.g., Self-Reported Behavioral Change Among Gay and Bisexual Men—San Francisco*, 34 MORBIDITY & MORTALITY WEEKLY REP. 613 (Oct. 11, 1985); McKusick, Wiley, Coates, Stall, Saika, Morin, Charles, Horstman & Conant, *Reported Changes in the Sexual Behavior of Men at Risk for AIDS, San Francisco, 1982-84—the AIDS Behavioral Research Project*, 100 PUB. HEALTH REP. 622 (1985); *Declining Rates of Rectal and Pharyngeal Gonorrhea Among Males—New York City*, 33 MORBIDITY & MORTALITY WEEKLY REP. 295 (June 1, 1984), *reprinted in* MMWR REPORTS at 59.

sexual practices prohibited by the statute. Criminalization is likely to compromise the efficacy of informal educational networks by making people more cautious about what they reveal about themselves to acquaintances. It also presents state public health officials with the awkward choice of appearing to suppress information about safe sex techniques or appearing to condone felonious conduct.

In short, the statute is likely to deter *only* conduct necessary to *improve* the public health. From a public health standpoint, the statute is simply counterproductive.

B. The Georgia Statute Does Not Further Any Mental Health Objectives and Injures the Mental Health of Many Members of Society, with Harmful Repercussions for Individual Physical Health.

The statute is also counterproductive with respect to mental health goals. Because freedom to choose whether to engage in the prohibited conduct *benefits*, rather than harms, individual mental health, deterring individuals from engaging in the types of sexual conduct specified—even if criminal laws could do so—cannot be defended as a mental health objective. Similarly, because homosexuality is not pathological, individual mental health is not served by official attempts to "deter" people from becoming homosexuals.

Even assuming, *arguendo*, that lowering the incidence of homosexual orientation in society were in some other way a legitimate governmental objective, criminalization of homosexual conduct does not have this effect. Although it is clear that same-sex orientation and activity do not indicate mental disorder and illness, it is less clear why some people have a same-sex orientation. Few of the theories advanced to explain the formation of sexual orientation are supported by reliable data.[74] Certainly, homosexual orientation is not a matter of simple choice.

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[74] Several popular theories have been disproved. *See* A. BELL, M. WEINBERG & S. HAMMERSMITH, SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN (1981) [hereafter A. BELL, *et al.*].

It is a set of emotions and proclivities often established early in life. Research indicates that sexual orientation develops independently of isolated sexual experiences, and the data do not support the idea that early childhood homosexual activity has any direct relationship to later sexual orientation.[75] Indeed, there are no empirical data to support the popular myth that homosexual orientation or behavior results from "contagion" by other homosexuals. The only consistent findings are that homosexuals have many more and much stronger sexual fantasies about members of their own sex, and that these fantasies usually appear during childhood and early adolescence.[76]

Once established, homosexual orientation is not easily modified. Researchers agree that the sexual orientation of only a small fraction of homosexual people who are highly motivated to change has been or can be modified through therapy.[77] Consensual sodomy laws thus have little or no effect on the incidence of homosexual orientation.[78]

Furthermore, statutes outlawing variant sexual behavior do cause substantial psychological harm, which, in turn, may have serious consequences for physical health.

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[75] *E.g.*, A. BELL, *et al.*, *supra* n. 74, at 97-113 (62% of heterosexual men reported that their first sexual encounter was with another male; 39% of homosexual men reported such experience); *see* Stephen, *Parental Relationships and Early Social Experiences of Activist Male Homosexuals and Male Heterosexuals*, 82 J. ABNORMAL PSYCHOLOGY 506 (1973).

[76] Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOC. PSYCHOLOGY 783 (1980).

[77] *See* Coleman, *Changing Approaches to the Treatment of Homosexuality: A Review*, in HOMOSEXUALITY, *supra* note 12, at 81-88 (1982); Marmor, *Clinical Aspects of Homosexuality*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 277 (Marmor ed. 1980). Moreover, for many homosexuals, seeking to change sexual orientation would be an inappropriate goal of psychotherapy. *See* Davison, *Politics, Ethics and Therapy for Homosexuality*, in HOMOSEXUALITY, *supra* n. 12, at 89-98 (1982).

[78] Kimmel, *supra* note 60.

in part because their behavior is punishable by criminal law,[79] homosexuals become stigmatized as "deviants"[80] and are viewed in terms of undesirable stereotypes. This process results in prejudice—called homophobia—against homosexuals by many heterosexual people. Homosexuals develop coping mechanisms, which are common traits in most persecuted groups. These traits can include excessive concern with minority group membership, feelings of insecurity, withdrawal, militancy, and neuroticism. They can also include denial of membership in the group, self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophesies about one's own inferiority.[81] The great majority of gay people come to terms with their sexual orientation and integrate it into their lives. Studies demonstrate that these homosexuals are the most psychologically well-adjusted. But the small group of homosexuals who do not overcome this are more troubled and dysfunctional, and may act in self-destructive ways and destructively toward other gay people.[82] This clinically observed psychological condition is known

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[79] Although sodomy statutes apply to heterosexual conduct as well as homosexual conduct, in practice they are enforced almost exclusively against homosexuals. *See, e.g.*, Gallo, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration In Los Angeles County*, 13 U.C.L.A. L. REV. 643 (1966); WEINBERG & WILLIAMS, *supra* note 33. It is well-known in both law, *see Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954), and psychology, *see, e.g.*, J. JONES, PREJUDICE AND RACISM 138-40 (1972), that social or moral pronouncements as expressed through the law and imposed by a majority on a minority can through the process of stigmatization significantly injure the mental health of members of the minority.

[80] The term "deviant" as used in the social sciences refers to the social *reaction* to behavior, not to the intrinsic characteristics of the behavior itself. H. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963).

[81] *See, e.g.*, G. ALLPORT, THE NATURE OF PREJUDICE (1954).

[82] Homosexuals who have been able to express their homosexuality are psychologically healthier than those who have repressed it. BELL & WEINBERG, *supra* note 34; Hammersmith & Weinberg, *Homosexual Identity: Commitment, Adjustment, and Significant*

as "internalized homophobia." [83] This psychological harm is a significant health cost of the Georgia statute.

By contributing to imposing internalized homophobia, criminal sodomy statutes also harm the effort to combat AIDS. Despite major shifts in the at-risk population to "safe sex" practices, a small minority of gay men continues to engage in dangerous conduct. To a significant extent, internalized homophobia may cause this destructive and self-destructive behavior. Although this group is very small as a percentage of all gay men, *see* pp. 9-10, *supra*, for a disease with the etiology of AIDS the consequences are tragic.

In terms of both physical and mental health, the statute is counterproductive.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Others, 36 SOCIOMETRY 56 (1973); WEINBERG & WILLIAMS, *supra* note 33.

[83] *See* Gonsiorek, *Psychotherapeutic Issues with Gay and Lesbian Clients*, in 3 INNOVATIONS IN CLINICAL PRACTICE: A SOURCEBOOK 73-76 (Keller *et. al.* eds. 1984); Malyon, *Psychotherapeutic Implications of Internalized Homophobia in Gay Men*, in HOMOSEXUALITY AND PSYCHOTHERAPY: A PRACTITIONER'S HANDBOOK OF AFFIRMATIVE MODELS 59-69 (Gonsiorek ed. 1982).

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No. 85-140

In The
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October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Organization for Women, Inc. (NOW) is a national membership organization of women and men. NOW's purpose, as outlined in its bylaws, is to take action to bring women into full participation in the mainstream of American

society. This purpose includes securing equal rights and responsibilities in all aspects of citizenship, and freedom from discrimination based on race, ethnic origin, age, marital status, parenthood, or sexual preference/orientation.

NOW's interest in this case springs from two concerns. First, sodomy laws, such as the one in question in this case, are designed and used to discriminate against gay men and lesbians by invading their constitutional right to privacy. Second, the right to privacy has been held by this Court to be the source of women's right to reproductive freedom, including access to contraception and the right to safe, legal abortion. A result in this case that limits the right to privacy may result in increased discrimination against all women and against lesbians and gay men, preventing them

from achieving equality with other Americans.

SUMMARY OF ARGUMENT

The opinion of the Court of Appeals for the Eleventh Circuit in Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), is correct and should be affirmed. The court below correctly determined that Georgia's sodomy statute affected respondent's constitutional right to privacy and was thus to be scrutinized under the "compelling state interest" standard.

Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 90 (1976), aff'g 403 F.Supp. 1199 (E.D. Va. 1975), is not binding on lower courts with regard to the issues presented here. That case, in which this Court summarily affirmed a less than clear district court ruling, does not provide definitive guidance on the important constitutional issues in this case. The signiticance of

Doe v. Commonwealth's Attorney is cast into further doubt by subsequent doctrinal developments in both this and lower courts.

The state should be required to show a compelling interest before it is permitted to interfere with private, consensual sexual choices made by adults. The "right to be let alone," Olmstead v. United States, 277 U.S. 438, 478 (1928), has been recognized by this Court to cover an increasingly broad spectrum of activities. The statute in question infringes on this right with respect to all adults, married or single, homosexual or heterosexual, residing in Georgia.

The statute should be reviewed under strict, or heightened, scrutiny, since the state seeks to apply it in a discriminatory fashion against members of a minority group. The arguments advanced

against affirmance show no constitutional basis for the statute, but rather demonstrate invidious, long-term discrimination that the state seeks to perpetuate.

ARGUMENT

I. DOE V. COMMONWEALTH'S ATTORNEY DOES NOT CONSTITUTE BINDING PRECEDENT WITH REGARD TO THE ISSUES IN THIS CASE

A. Doe Did Not Clearly Dispose of the Issues Present Here

The Court of Appeals for the Eleventh Circuit correctly determined that Doe v. Commonwealth's Attorney is not binding precedent concerning the matters at issue here. 1/ In Doe v. Commonwealth's Attorney, the Court summarily affirmed a decision in which a three-judge district court panel declined to overturn a portion of the Code of Virginia under which

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1/ The Court need not reach the constitutionality of the statute here, but need only decide whether the court below set out the appropriate standard for review.

plaintiffs, homosexual males, alleged that they might be prosecuted. The district court concluded that "on its face and in the circumstances here [the statute] is not unconstitutional." 403 F.Supp. at 1200 (E.D. Va. 1975) (emphasis added). The court did not elaborate on which circumstances it considered significant. As noted, this Court summarily affirmed the district court.

Doe v. Commonwealth's Attorney is at best dubious precedent. The district court did not explain what "circumstances" controlled its decision. The court disagreed with plaintiffs' attempt to characterize the matter as a class action suit. Id. Also, plaintiffs had not been arrested and placed in fear of prosecution, as has respondent Hardwick in the instant case. Thus, there were signifi-

cant standing and procedural questions in Doe not present here.

The lack of clarity in the district court opinion makes it difficult to discern which issues were placed before this Court. As the court below correctly stated, summary dispositions by this Court have precedential weight concerning only "the precise issues presented and necessarily decided by those actions." Metromedia, Inc. v. San Diego, 453 U.S. 490, 499 (1981). The fact that there is disagreement among the Courts of Appeal as to the significance of Doe confirms the questionable precedential value of that case. 2/

2/ Compare Hardwick v. Bowers with Baker v. Wade, 769 F.2d 289 (5th Cir. 1985), and Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

B. Subsequent Doctrinal Developments Cast Further Doubt upon the Validity of Doe

As the court below determined, doctrinal developments since Doe render petitioner's reliance on that case even more tenuous. In Carey v. Population Services International, 431 U.S. 678 (1977), this Court held unconstitutional a statute that purported to regulate the distribution and advertising of contraceptives, particularly to minors. The Court noted that "'[we have] not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' n.17, infra, and we do not purport to answer that question now." 431 U.S. at 688 n.5. As the court below stated:

> Footnote 17, although joined only by a plurality, casts some light on the nature of the "private, consensual behavior among adults" referred to in footnote

> 5 because it cites a law review comment that discusses the possible application of Supreme Court precedent to criminal statutes outlawing private consensual sexual activities, including sodomy.

760 F.2d at 1209 (footnote omitted). It appears from this analysis that the Carey Court considered the constitutional rectitude of state regulation of private consensual adult sexual behavior to be an open question. It is difficult, then, to assert that Doe, decided a year earlier, established clear precedent on the subject. 3/

More recently, the Court granted certiorari in New York v. Uplinger, ___ U.S. ___, 104 S.Ct. 64 (1984), and then

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3/ Several lower courts have also opined that the question is an open one. See, e.g., Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980).

dismissed the writ as having been improvidently granted, ___ U.S. ___, 104 S.Ct. 2332 (1984). In Uplinger, the New York Court of Appeals had ruled unconstitutional a statute forbidding loitering for the purpose of "deviate sexual behavior." 58 N.Y.2d 936, 447 N.E.2d 62 (1983). The court's holding in Uplinger was based on an earlier case, People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1981), cert. denied, 451 U.S. 987 (1981), in which it had held that the Federal Constitution precluded a statute criminalizing consensual sodomy and "deviate" sexual intercourse. 4/

4/ Although limited to unmarried persons, the New York statute was similar to the law at issue in that it criminalized contact between the penis and the anus, the mouth and the penis, and the mouth and the vulva.

In Onofre the court based its decision on earlier decisions of this Court:

> In light of [Supreme Court] decisions, protecting under the cloak of the right to privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions -- such as those made by defendants before us -- to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct, so long as the decisions are voluntarily made by adults in a non-commercial, private setting.

51 N.Y.2d at 488 (footnote omitted). 5/

5/ The Supreme Court of Pennsylvania, in Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980), echoed the holding of the New York court and held that a statute forbidding "sexual intercourse per os or per anus between human beings who are not husband and wife" was invalid as an overbroad exercise of the state's police powers and an infringement on equal protection of the laws. See State v. Pilcher, 242 N.W.2d 348 (Iowa 1976). See also State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1971).

That this Court denied certiorari in Onofre and dismissed the writ issued in Uplinger demonstrates that the Court did not find those rulings to be in conflict with precedent, including Doe. The weight of these decisions, when added to the discussion in Carey, casts additional doubt on whether Doe possesses any validity with regard to the issues presented in this case. The court below was correct in refusing to find that Doe is dispositive here. 6/

6/ The Court of Appeals for the Fifth Circuit has held Doe to be dispositive in a case which appears to be in direct conflict with Hardwick. Baker v. Wade, 769 F.2d 289 (5th Cir. 1985). The other appellate cases cited by petitioner, Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), and Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981), involved navy regulations penalizing homosexual conduct. While amicus questions those decisions, they involved the military need for discipline which justifies "restrictions that go beyond the needs of civilian society," 741 F.2d at 1392, (citations omitted) and are not on point here.

II. THE GEORGIA STATUTE AFFECTS RESPONDENTS' RIGHT TO PRIVACY AND MUST BE REVIEWED UNDER THE "COMPELLING STATE INTEREST" STANDARD

It has long been established that the Constitution guarantees the general right of the people to lead their lives as they see fit and that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." Meyer v. Nebraska, 262 U.S. 390, 390-400 (1923). See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

In Griswold v. Connecticut, 381 U.S. 479, 485 (1965), this Court held that a law forbidding the use of contraceptives by married persons concerned a "zone of privacy created by several fundamental constitutional guarantees." The Court

asserted that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 485. After reviewing the zones of privacy created by the First, Third, Fourth, Fifth, and Ninth Amendments, the Court concluded that the statute in question was impermissibly broad, thereby invading the area of a protected right. Id. at 485.

The Court further delineated the right to privacy in Eisenstadt v. Baird, 405 U.S. 438 (1971), striking down a statute that prohibited, inter alia, the distribution of contraceptives to unmarried persons. The Court explained that while the right to privacy in question in Griswold had been rooted in the marital relationship, "[i]f the right to privacy means anything, it is the right of the individual, married or

single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

The right to privacy was later determined to protect a woman's right to decide to have an abortion. "This Right to Privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. 113, 153 (1973). The Court added that regulation restricting this right could be justified only in the

case of a compelling state interest. Id. at 155-56. 7/

In Carey v. Population Services, the Court affirmed a district court decision declaring unconstitutional a statute restricting the sale and advertising of contraceptives. A plurality of the Court rejected the argument that "sexual activity may be deterred by increasing the hazards attendant on it." 431 U.S. at 694.

The right to privacy protects a wide variety of actions. While early decisions in the area covered such matters as the right to teach (Meyer),

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7/ Since Roe, the Court has held unconstitutional a number of statutes limiting the right to abortion. E.g., Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973).

the zone of privacy was later found to cover abortion (Roe) and contraception both inside (Griswold) and outside (Eisenstadt) of marriage. Moreover, rights included within the zone of privacy are not restricted to relationships sanctioned by the state, but have been held applicable to criminals (Skinner v. Oklahoma, 316 U.S. 535 (1942)), unmarried persons (Bellotti v. Baird, 443 U.S. 622 (1979); Eisenstadt), and minors (Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Carey).

It follows from these cases that private, consensual sexual conduct falls within the protected zone of privacy. Unless the state can show a compelling reason for invading this zone, it should

not be permitted to do so. 8/ It is difficult to imagine a more fundamental and more private decision than the choice of sexual partners and activities. The state should be required both to provide a compelling justification for any interference with this choice and to demonstrate that any necessary regulation is as narrow as possible.

The right to privacy has been held to have an added dimension when that right is exercised within the confines of the home. See Payton v. New York, 445 U.S. 573 (1979). Thus, in Stanley v. Georgia, 394 U.S. 557 (1969), the Court held that the state could not forbid the private showing of material which could be barred from public display as obscene.

8/ See Gerety, "Redefining Privacy," 12 Harv.C.R.-C.L.L.Rev. 233 (1977).

The Court stated:

> also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy.
>
> > "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)

394 U.S. at 564 (citations partially omitted). That the conduct at issue in this case is private, as well as consen-

sual, makes respondents' claim of constitutional protection even stronger. Correspondingly, the state's attempt to invade the home increases its burden.

It should also be noted that while the state focuses upon the statute's proscription of activities which may be in some instances homosexual, 9/ the scope of the statute is far wider. Assuming arguendo that the statute has a legitimate purpose, it renders unlawful a broad range of activity which might be engaged in by both married and unmarried persons, homosexual and heterosexual alike, and therefore violates the requirement that statutes affecting fundamental rights "be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155-56. See Griswold v. Connecticut, 381 U.S. at 485; Aptheker

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9/ See generally Petitioner's Brief at 18-40.

v. Secretary of State, 378 U.S. 500, 507-509 (1964).

Moreover, the state's attempt to focus on what it considers to be an undesirable minority group constitutes a violation of equal protection. While, as noted, the statute could be applied to cases involving heterosexual, as well as homosexual, activity, the state has focused exclusively upon the latter. This appears, therefore, to be a case where "whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of . . . equal protection of the laws . . ." Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

III. STATUTES DESIGNED OR ENFORCED TO DISCRIMINATE AGAINST HOMOSEXUALS SHOULD BE VIEWED WITH STRICT, OR HEIGHTENED, SCRUTINY

This Court has recognized that certain minority groups are at such a disadvantage in society as to require special protection by the courts. Chief Justice Stone gave early expression to this principle, indicating that the Court should examine "whether prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

The Court has since answered Chief Justice Stone's question in the affirma-

tive and subjected to strict, or heightened, scrutiny state actions which appeared to discriminate against minority group members based solely on their minority status. 10/

Homosexuality is a classification which, when used as a basis for state action, should be considered suspect.

10/ Justice Brennan recently summarized those areas in which the court has given added scrutiny to state actions affecting certain groups: "See, e.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 723-724 (1982) (discrimination based on gender); Trimble v. Gordon, 430 U.S. 762, 767 (1977)(discrimination based on illegitimacy); Loving v. Virginia, 388 U.S. 1, 11 (1967) (discrimination based on race); Korematsu v. United States, 323 U.S. 214, 216 (1944)(discrimination based on national origin); see also Plyler v. Doe, 457 U.S. 202, 218-223 (1982)(suggesting heightened scrutiny for discrimination against alien children)." Rowland v. Mad River Local School District, ___ U.S. ___, 105 S.Ct. 1373, 1377 n.8 (1985)(Brennan, J., dissenting from denial of certiorari).

Justice Brennan has asserted that

> in applying the Equal Protection Clause, "we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" Plyler v. Poe, 457 U.S. 202, 216-217 (1982)(footnote omitted); see also id., at 245 (Burger, C.J., dissenting)("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility"). Under this rubric, discrimination against homosexuals or bisexuals based on their sexual preference raises significant questions under both prongs of our settled equal protection analysis.

Rowland v. Mad River Local School District, ___ U.S. ___, 105 S.Ct. 1373, 1376-77 (1985)(Brennan, J., dissenting from denial of certiorari).

Discrimination against homosexual men and women is both pervasive and damaging. "Because of the immediate and and severe opprobrium often manifested

against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility." Id. at 1377. 11/

In addition, homosexuals satisfy the qualifications set forth for a suspect classification by this Court. See

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11/ The nature of this hostility is demonstrated by certain briefs filed in this case. One of those briefs bases its argument upon archaic anti-sodomy laws in force at the time of the Bill of Rights, most of which called for the death penalty. Such statutes arose from the same animus as the Jim Crow laws and are of equal constitutional validity. Another brief would justify discrimination against homosexuals based solely upon the fears surrounding the spread of Acquired Immune Deficiency Syndrome. If this argument had any validity, the state could forbid blacks to have sex to prevent their passing sickle-cell anemia to their children, or could ban heterosexual sex completely in order to eliminate venereal disease.

Matthews v. Lucas, 427 U.S. 495, 505 (1976)(heightened review applied to official discrimination based on characteristics which are beyond the individual's control and bear "no relation to the individual's ability to participate in and contribute to society"). There is no evidence in the record that homosexuality is a matter of choice, 12/ nor can it seriously be maintained that homosexuality has a detrimental effect upon an individual's contributions to society. Statutes of the type at issue here (at least in terms of the proposed manner of enforcement of the statute) "may have no rational relationship -

---

12/ For the view that sexual orientation is determined well before the period of deliberate sexual choice, see, e.g., Bell, Weinberg and Hammersmith, Sexual Preference: Its Development in Men and Women (1983); Karlen, Sexuality and Homosexuality, 572-606 (1971).

other than pure prejudicial discrimination - to the stated purpose for which the classification is being made." Id. at 521 (Stevens, J., dissenting). Statutes that purport to make distinctions based on homosexuality should therefore be given heightened scrutiny. 13/

CONCLUSION

The individual's right to privacy must include the right to personal choice concerning private, consensual adult sexual conduct. This is a right firmly

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13/ While the statute is not on its face restricted to homosexual activity, it appears that the state's intention is to apply the law only against homosexuals. Petitioner states that "[i]n Georgia, it is the very act of homosexual sodomy that epitomizes moral delinquency," Petitioner's Brief at 36, adding that "homosexual sodomy is the anathema of the basic units of society." Id. at 37. See generally id. at 18-40. This type of discriminatory law enforcement is unconstitutional. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

grounded in the Constitution. As the court stated in Onofre:

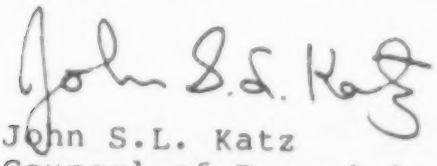
> We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective.

51 N.Y.2d at 488 n.3.

Whether the statute at issue here comports with the Federal Constitution is a question to be answered through a process calling for an examination in the first instance by the district court, under the compelling state interest standard thoughtfully articulated by the court below.

The judgment and order of the Court of Appeals should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, that this brief is filed pursuant to Rule 36.2 of this Court with the consent of the parties on file with the Clerk, and that I have this 31st day of January, 1986, served three copies of this brief upon counsel for petitioner and counsel for respondents.

John S.L. Katz

Supreme Court, U.S.
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No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF AMICI CURIAE

THE PRESBYTERIAN CHURCH (U.S.A.)
THE PHILADELPHIA YEARLY MEETING OF FRIENDS
THE AMERICAN FRIENDS SERVICE COMMITTEE
THE UNITARIAN UNIVERSALIST ASSOCIATION
OFFICE FOR CHURCH AND SOCIETY OF THE UNITED CHURCH OF CHRIST
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INTEREST OF AMICI CURIAE[1]

As religious bodies, our ministry compels us to oppose all forms of discrimination. For this reason we support the position of the respondent, Michael Hardwick, and seek to present our basis for that support as Amici Curiae. Individually our interests are these:

THE PRESBYTERIAN CHURCH (U.S.A.) is a religious body composed of more than 3,100,000 members, organized into approximately 11,600 congregations in every state and the Commonwealth of Puerto Rico. Its General Assembly has officially declared its support for "the optimal exercise of private moral judgment and choices in matters related to the sexual sphere of life," and urged its governing bodies and congregations to support and give leadership to the "elimination of laws governing the private sexual behavior of consenting adults." While the General Assembly does not bind the consciences of individual members, its actions are considered the most representative statements of the denomination as a whole. This brief is filed in furtherance of that statement.

PHILADELPHIA YEARLY MEETING is a religious body with local congregations ("Meetings") within Pennsylvania, New Jersey, Delaware and Maryland. It has created a committee on the civil rights of homosexuals to assist local Meetings in responding to the needs of homosexual members and to participate in the effects of community groups to protect the rights of homosexual people. In 1973 Philadelphia Yearly Meeting minuted its support for this work.[2]

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[1]Counsel of record for all parties have consented to the filing of this brief. Pursuant to Rule 36, letters of consent have been filed with the Clerk of this Court.

[2]*See* Statement of Philadelphia Yearly Meeting of Friends, Appendix A.

AMERICAN FRIENDS SERVICE COMMITTEE has been active since 1917 in work of humanitarian relief and service, reconciliation among nations and peoples and programs to overcome discrimination and oppression. The AFSC carries out its work on behalf of the several branches of the Religious Society of Friends. Friends' belief in the worth of all persons in the sight of God has led the Committee to commit a significant portion of its resources to deal with those aspects of our society which result in exclusion, denial of rights or diminuation of civil liberties. In 1976, the AFSC Board affirmed its respect and loving concern for its homosexual and bisexual committee and staff members, and minuted its support of the civil and human rights of homosexual persons. AFSC has initiated actions to implement this concern through staffing policies and program activities designed to raise awareness in the larger community of the problem of discrimination based on sexual orientation, recognizing that such discrimination harms both its direct victims and the community as a whole.

JOINT STATEMENT OF FRIENDS. Both the American Friends Service Committee and the Philadelphia Yearly Meeting of the Religious Society of Friends have a vital interest in this litigation because its resolution will affect members and constituents and because of Friends' basic belief in the infinite worth of each human being. Both groups seek to express the belief of Friends, but no group can speak for all Friends.

THE UNITARIAN UNIVERSALIST ASSOCIATION is an association of over 1,000 member churches across the United States with a membership in excess of 100,000; its intervention here is based upon its commitment to protect against infringement by governmental authorities of the First Amendment rights of all persons.

OFFICE FOR CHURCH AND SOCIETY OF THE UNITED CHURCH OF CHRIST is an established instrumentality of the United Church of Christ, a national christian fellowship. Among other responsibilities the Office for Church and Society is charged with assisting the Church's mission as it pertains to social education and action. Its interest in this case stems from the action of General Senate of the United Church of Christ (the representative body of the denomination) in urging all of its instrumentalities to work for the decriminalization of private sexual acts between consenting adults.

THE RIGHT REVEREND PAUL MOORE, JR. is the Bishop for the Episcopal Diocese of New York. Bishop Moore is the highest governing official of the Church in the Diocese and is the chief liturgical officer in the Diocese. Ultimate spiritual questions are left to the discretion of the Bishop, within the guidelines established by Common Law. His participation in the brief is as an individual concern for securing the civil rights of all persons, including homosexuals.

SUMMARY OF ARGUMENT

Georgia asserts that it has a compelling interest in regulating intimate sexual expression by consenting adults within the confines of a private home. Our Constitution, our traditions as a people, and this Court's prior decisions declare that the intimate association of consenting adults in the privacy of the home is a constitutionally protected activity. Therefore, the State must go beyond mere assertion of an interest. It must demonstrate the nature of its asserted interest; it must show *why* it is imperative that the private sexual expression of consenting adults be made a felony.

Georgia advances but one justification for criminalizing consensual sodomy: the presumed mandate of "traditional moral values." However, the moral character of unorthodox sexuality is the subject of ongoing controversy, even among the religious groups who presumably define and promote "traditional moral values." To the extent there is any consensus concerning alternative forms of sexual expression, heterosexual or homosexual, it is that private sexual conduct is a matter fundamentally committed to individual moral choice. Because we do not understand the full mystery of human sexuality, and because we are unwilling to condemn that which we do not understand, we believe as a matter of ethics that characterizing consensual sodomy as immoral is unwise. Because there is no consensus among the people of Georgia or of this nation that this conduct is manifestly wrong or dangerous or evil, the proscription of unorthodox sexuality by criminal statute is clearly wrong. Criminal laws that usurp the role of individual moral choice in the context of private consensual sexual expression between adults may not rely for their justification on vague invocations of "traditional moral values." They must stand or fall on their intrinsic necessity, or lack thereof, to the public welfare.

No legitimate basis in contemporary morality justifies making private consensual sodomy a crime. The only relevant moral mandate involved is the fundamental right of an individual to make decisions in matters of private intimate sexual expression without undue interference from the State. Because it contravenes this principle, Georgia's sodomy law is a presumptively impermissible intrusion upon intimate association and the sanctity of the home. The State should be made to explain the compelling interest it asserts.

ARGUMENT

I. O.C.G.A. § 16-6-2 Intrudes Upon Established Rights Of Intimate Association And The Sanctity Of The Home.[3]

The statute at issue in this case provides:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than twenty years.

O.C.G.A. § 16-6-2 (1984).

This law is without limitation. It contains no limitation as to place, and no limitation as to marital status. It criminalizes heterosexual and homosexual association. It makes acts committed in the privacy of the home as culpable as acts committed in the most public place. Its penalty is draconian. Most significantly, the law serves no apparent public interest.

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[3]The evolution and application of the rights of intimate association and the sanctity of the home are carefully examined in the brief of the respondent, Michael Hardwick, and in the briefs of other amici curiae submitted in support of the respondent. In the interest of brevity, we refer the Court to these arguments. This brief will identify the constitutional protections which are implicated by Georgia's sodomy law in summary form. We are more concerned with showing this Court that there exists no consensus of moral opinion which would justify the presumptive validity of such a statute.

A. Georgia's Sodomy Statute Intrudes Upon The Freedom of Intimate Association.

Twenty years ago, the Court confronted a constitutional challenege to Virginia's miscegenation statute. *Loving v. Virginia*, 388 U.S. 1 (1967). At that time, sixteen states still had laws criminalizing interracial marriages. *Loving*, 388 U.S. at 6. In support of this criminal sanction, Virginia asserted a then-popular view that sexual contact between blacks and whites was immoral.[4] The Court rejected Virginia's appeal to traditional moral values and struck the statute down on due process and equal protection grounds. Its landmark decision established that states may not constitutionally interfere with private and consensual sexual association on the basis of a majoritarian moral preference.

Twenty years later, Georgia has resurrected the same arguments the Court rejected in *Loving*. Proclaiming its mandate to enforce "traditional moral values," Georgia now asks leave to disregard the constitutional limits on state power to criminalize private sexual association defined by this Court's decision over the past twenty years.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court held that the State of Connecticut could not constitutionally forbid the use of contraceptives because the law by which the State sought to do so was incapable of being enforced in a way which would not interfere with the mari-

---

[4]The Virginia trial judge who had upheld the statute articulated the perceived "moral" underpinnings of the challenged statute:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving, 388 U.S. at 3.

tal relationship. The association of marriage was protected within a zone of privacy—an essential corollary to the express guarantees of the Bill of Rights.[5] In *Eisenstadt v. Baird*, 405 U.S. 438 (1972) this Court recognized that the zone of associational privacy extended beyond the marital relationship to encompass the intimate association of two unmarried individuals.[6] In *Roe v. Wade*, 410 U.S. 113 (1973), this Court recognized that a right of privacy surrounds the decision to terminate a pregnancy. *Roe v. Wade*, 14 U.S. at 164.

These cases establish a right to be free from undue state interference in the exercise of individual choice in matters which fundamentally affect our identity as a person. Laws that interfere with such choices must be justified by a clear public imperative.

There can no longer be any doubt that decisions about sexual expression fundamentally affect the whole person. As religious organizations have long recognized: "[m]an does not merely have sexual relations; he demonstrates his true humanity in personal relationships, the most intimate of which are sexual." *Statement on Homosexuality*, Lutheran Church In America, Biennial Convention, 1970, *reprinted in* Homosexuality and Ethics 237 (E. Batchelor ed. 1982).

> The mystery of our sexuality is the mystery of our need to reach out and embrace others, physically

---

[5]The reasoning was straightforward. If the marital relationship were not itself protected, the express guarantees of the Bill of Rights which rigidly protect more casual associations would be meaningless. *Griswold*, 381 U.S. at 484-86.

[6]As Justice Brennan stated: "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear to beget a child." *Eisenstadt*, 404 U.S. at 453.

> and spiritually. Sexuality expresses God's intention that we find our authentic humanness in relatedness to others.
>
> . . .
>
> Sexuality, then, involves much more than what we *do* with our genital organs. It is *who we are* as body-persons who experience the emotional, cognitive, and physical need for intimate communication with others.

Faith, Ethics, and Sexuality, Human Sexuality—A Preliminary Study 87, 87 The United Church Board for Homeland Ministries, by commission of the 1975 General Synod of the United Church of Christ (1977).

Michael Hardwick, by seeking the freedom to express his sexuality with another like-minded and consenting adult in the privacy of his own home, is not seeking unfettered sexual autonomy. He is invoking the right of one human being to associate intimately with another like-minded human being. It is this *association* which deserves constitutional guarantees. The coincidental character of that association as homosexual should not remove the protections which *Loving*, *Griswold*, *Eisenstadt*, and *Roe* established.[7]

If there is any difference between this case and the other right of privacy cases, however, it lies in the direct impact of the burden imposed on intimate association. In the contraception cases, the challenged regulation did not forbid the intimate association itself, but merely the provision of contraceptives which would make sexual acts less likely to result in pregnancy or disease. The abortion statutes considered in *Roe* made obtaining an abortion

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[7]*See, e.g.*, Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 626 (1980).

more difficult by penalizing the one who performed the abortion—in the usual case, not the person exercising the protected choice. In contrast, Georgia's law declares that a person who chooses to engage in intimate association involving sodomy may be imprisoned for not less than one and not more than twenty years. This proscription not only burdens the exercise of constitutional right, it obliterates it. It is the proper function of cases like *Loving*, *Griswold*, *Eisenstadt* and *Roe* to demand justification of such a law. *Carey v. Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976).

B. Section 16-6-2 Also Implicates The Sanctity Of The Home.

Georgia's proscription of sodomy reaches conduct no matter where it occurs. Acts in the privacy of one's own home are as culpable as acts in the most public place. For this reason, as well, the statute is presumptively improper.

In *Payton v. New York*, 445 U.S. 573, 601 (1980), this Court recognized a fundamental difference between the power of the State to effect its purposes in the public domain and its power to enter the confines of a private home for those same purposes. *Payton*, 445 U.S. at 589-590. *Stanley v. Georgia*, 394 U.S. 557 (1969), established that governmental power to regulate the viewing of pornography does not extend into the privacy of the home. *Stanley*, 394 U.S. at 565.

Both *Payton* and *Stanley* recognize a zone of privacy. It is a zone defined by location—the private home—rather

than by subject matter. Acts occurring within the home receive constitutional protections analogous to those accorded the marital relationship, the contraceptive decision, and the abortion decision. The reason for this similarity is the common source of all privacy rights: the fundamental "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Georgia's sodomy law contravenes locational privacy rights. In a place where the State may not regulate the viewing of pornography, it may not, without a compelling interest, proscribe the sexual expression of two consenting adults.[8] Georgia should be made to come forward to prove its asserted interest is sufficiently compelling to overcome this constitutional prohibition.

II. The Mere Assertion Of "Traditional Moral Values" Is No Longer Adequate Justification For Making Private Consensual Sexual Expression A Felony

A. There Is No Contemporary Consensus About The Objective Morality Of Sexual Unorthodoxy.

The sole justification Georgia advances for making consensual sexual expression a felony is "traditional

---

[8]Borrowing from, and adapting Justice Marshall's opinion in *Stanley*, it is almost as if:

> In the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from . . . [the concept of homosexuality]. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts.

Stanley v. Georgia, 394 U.S. at 565 (footnote omitted).

moral values." In so doing, the State would have this Court assume as a felt truth its assertion that sexual unorthodoxy, in particular sodomy as defined by the State statute, is intrinsically wrong or dangerous or evil.

Such an assumption is no longer valid in light of contemporary experience. Amici do not contest the power of the State of Georgia to regulate actions directly affecting the public. Sexual acts in a public place are within the regulatory power of the State. Georgia's criminal code proscribes those acts.[9] Similarly, the State may prohibit sexual acts with children, and has done so.[10] The State

---

[9]O.C.G.A. § 16-6-8 (1985), outlawing public indecency, provides as follows:

> A person commits the offense of public indecency when he performs any of the following acts in a public place and, upon conviction thereof, shall be punished as for a misdemeanor:
>
> (1) An act of sexual intercourse;
>
> (2) A lewd exposure of the sexual organs;
>
> (3) A lewd appearance in a state of partial or complete nudity; or
>
> (4) A lewd caress or indecent fondling of the body of another person.

[10]O.C.G.A. § 16-6-4 (1985), prohibiting molestation of children:

> (a) A person commits the offense of child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with intent to arouse or satisfy the sexual desires of either the child or the person . . .
>
> (c) A person commits the offense of aggravated child molestation when he commits an offense of child moles-

(Continued on following page)

may also, of course, prohibit sexual acts accomplished by force or imposition, and has done so.[11] But there is a fundamental difference between these sexual acts and the act of private consensual sexual expression between like-minded adults. That difference lies in the way in which we as a society balance individual liberty against public necessity, and in our commitment as a people to ensure "the right to be let alone." *Olmstead*, 277 U.S. at 478. As a society we believe that violence, including sexual violence, against women or men, heterosexual or homosexual, is abhorrent; we believe that children should be protected from overreaching and their own incompletely formed judgment; we believe that the State has a legitimate interest in maintaining the public order. There is a unified consensus on the objective morality of these aspirations.

(Continued from previous page)

tation which results in physical injury to the child or involves an act of sodomy.

O.C.G.A. § 16-6-3 (1985) prohibits statutory rape which is defined as follows:

> (a) A person commits the offense of statutory rape when he engages in sexual intercourse with any female under the age of 14 and not his spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the female.

[11]O.C.G.A. § 16-6-1 (1985) prohibits rape as follows:

> (a) A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ.

The remaining portion of the statute at issue in this case, O.C.G.A. § 16-6-2 (1985), prohibits aggravated sodomy as follows:

> (a) . . . A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

By contrast, there is no such certainty about the objective immorality of sexual unorthodoxy, homosexual or heterosexual. This question has stirred controversy for three decades. As a result of this controversy, statutes comparable to Georgia's sodomy law have been repealed or struck down in twenty-four states. Brief of Petitioner at 23. Likewise, the Model Penal Code recommends the decriminalization of consensual sodomy. In 1973, the House of Deputies of the American Bar Association authored a resolution which urged state legislatures to repeal "all laws which classify as criminal conduct any form of non-commercial sex conduct between consenting adults in private, saving only those portions which protect minors or public decorum." Statement of the House of Deputies, American Bar Association (1973), *reprinted in* Homosexuality and Ethics 242 (E. Batchelor ed. 1982). And on November 1, 1985, the Georgia Court of Appeals ruled that the sexual preference of a party to a contract dispute was irrelevant on any issue and was properly excluded from evidence. *Northern Assurance Co. of America v. Roll*, Nos. 70652, 70667, slip op. (Ga. Ct. App. Nov. 1, 1985).

These isolated events provide no answer to the question of sexual unorthodoxy's intrinsic morality or immorality. They do show, however, that there is no longer any unified opinion on that subject among the people of this country. They further show that making consensual private sodomy a felony is not so clearly mandated by public necessity that the State of Georgia may enforce such a law by merely asserting its power to do so. *See Zablocki v. Redhail*, 434 U.S. 374, 399 (Powell, J., concurring). In the absence of any unified view on sexual un-

orthodoxy, Georgia cannot justify intrusive regulation of O.C.G.A. § 16-6-2 by mere assertion. Rather, as Virginia was required to do in *Loving*, Georgia must explain the compelling interests giving rise to this statute.

B. Contemporary Consensus Requires The Decriminalization Of Consensual Sodomy.

In contrast to contemporary uncertainty about the objective morality of alternative means of sexual expression, heterosexual or homosexual, there is strong agreement, even among those who deem such conduct objectively immoral, that consensual unorthodox sexual acts should be decriminalized.[12] Phrased alternatively, this strong consensus evidences a new aspiration of our people: to enforce tolerance for diversity in our society. There is thus a new kind of moral value at work.

> [A] view is not a moral one merely because it is passionately and sincerely held, or because it has a certain emotional depth, or because it is the view of one's father or mother or clan, or because it is conventional.

---

[12]For example, Robert Gordis, a Professor of Theology and the editor of *Judaism* magazine, argues that homosexuality is not only immoral, but intrinsically evil. And yet he goes on to state:

> [A] basic caution is in order. . . . [H]omosexual activity, when carried on by adults in private and violating no one's wishes and desires, should be decriminalized on the statute books. The practice belongs to the rabbinic category of an act that is "free from legal punishment (by human agency), but forbidden." The homosexual in contemporary society has a just claim to be free from legal penalties and social disabilities.

Gordis, Homosexuality and the Homosexual, in *Homosexuality and Ethics*, 58, 60 (E. Batchelor ed. 1982). *See also* Statements of Policy, Appendix A.

> On the contrary, the moral point of view affords an impartial way of assessing whether any of these beliefs, which may often press one to action, is in fact worthy of ethical commitment.
>
> In similar ways and for similar reasons, not everything invoked by democratic majorities as justified by "public morality" is, in fact, morally justified. From the moral point of view, we must always assess such claims by whether they can be sustained by the underlying structure of moral reasoning—by principles of mutual respect, universalization, and minimization of fortuity. In this regard, constitutional morality is at one with the moral point of view.
>
> . . .
>
> This kind of moral analysis affords definite constraints on what may permissibly and justifiably be regarded as an ethical belief. In an area where public attitudes about public morality are, in fact, demonstrably not justified by underlying moral constitutional principles, laws resting on such attitudes are constitutionally dubious. There being no defensible moral principle to sustain state interference, the matter is not a proper object of state concern.

Richards, *Sexual Autonomy and The Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957, 977-78 (1979). It is this view—that public morality demands the State concern itself only with those areas in which it has a demonstrable interest in regulating—that represents the emerging moral consensus of our society. It is this view which we have adopted in our statements of official policy,[13] and it is this view which we, as amici, recommend to the Court.

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[13]See Appendix A.

We would merely require the State to explain the demonstrable public interest it asserts, and to show why that interest requires making private consensual sexual expression between two adults a felony.

———o———

CONCLUSION

O.C.G.A. § 16-6-2 intrudes upon freedoms which this Court and our Constitution have identified as fundamental to our way of life as a free people. For this reason, the State must justify the public necessity it asserts in defense of its sodomy law and it must go beyond the bald assertion of "traditional moral values" in doing so.

Invocation of "traditional moral values" no longer adequately justifies making private consensual sexual acts a felony because contemporary experience teaches that there is no broad andate which would condemn this conduct. To the contrary, there is a strong moral argument and an emerging consensus that prohibition of sexual unorthodoxy by criminal law is itself immoral and an improper exercise of legislative power. At the very least, however, the State should be made to explain its claimed public imperative to the contrary.

Finally, as amici, we seek to show the Court that we and other Christian and Jewish religious organizations, in pursuit of a shared ministry to eradicate discrimination, have articulated policies contrary to the "traditional moral values" asserted by the State in this case.

For all of these reasons, the State should be required to demonstrate that it has a compelling interest in regulating consensual sodomy through a law which makes that conduct a felony. The decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM OFFICIAL MINUTES, PRONOUNCEMENTS, POLICY STATEMENTS AND OTHER GENERAL DECLARATIONS OF PURPOSE OF AMICI HEREIN.

As religious bodies, we are compelled in our ministry to work for the end of discrimination in any form. We are participating in this case as *amici* because we believe that the Georgia sodomy law is an unwarranted intrusion upon the fundamental rights of those committed to our pastoral care and of all persons in this nation, irrespective of their sexual orientation, beliefs, or practices. We wish to demonstrate to this Court that many denominations, whether or not they believe that particular sexual practices may be moral or immoral, nevertheless firmly believe that regulation of the private sexual expression of two consenting adults is wrong.

PRESBYTERIAN CHURCH (U.S.A.):

Statement from General Assembly Minutes of 1970:

> Believing that the law should provide for the optimal condition of physical and mental health, and should allow for the optimal exercise of private moral judgment and choices in matters related to the sexual sphere of life; and recognizing that religious convictions held by individuals should not be imposed by law upon the secular society; the 182nd General Assembly (1970):
>
> . . . (4) calls upon judicatories and churches to support and give leadership in movements toward the elimination of laws governing the private sexual behavior of consenting adults . . .

Statement from General Assembly Minutes of 1978:

The General Assembly

> . . . (12) reaffirms the need, expressed by the 182nd General Assembly (1970), for Presbyterians to work for the decriminalization of private homosexual acts between consenting adults, and calls for an end to the discriminatory enforcement of other criminal laws against homosexual persons.

THE PHILADELPHIA YEARLY MEETING OF FRIENDS:

Minutes of the Philadelphia Yearly Meeting Friends, 1973:

> We should be aware that there is a great diversity in the relationships that people develop with one another. Although we neither approve nor disapprove of homosexuality, the same standards under the law which we apply to heterosexual activities should also be applied to homosexual activities.
>
> Since persons who engage in homosexual activities suffer serious discrimination in employment, housing and the right to worship, we believe that civil rights laws should protect them. In particular we advocate the revision of all legislation imposing disabilities and penalties upon homosexual activities.

THE AMERICAN FRIENDS SERVICE COMMITTEE: Minutes of the Board of Directors of the AFSC, January 18-19, 1976:

> The AFSC Board of Directors supports the civil and human rights of homosexual and bisexual persons, and commits itself to implement this concern.
>
> It is the Board's policy to be non-discriminatory in personnel matters regardless of race, religion, class, sex, or sexual preference.
>
> The Board affirms its respect and loving concern for its homosexual and bisexual committee and staff members and expresses its recognition of their valuable participation within the AFSC.
>
> The Board recognizes that gay persons suffer not only from denial of legal rights and discrimination in

employment but also from stereotyping from cruel jokes and from condescension.

The Board asks the Chairman in consultation with the Executive Secretary to devise means to implement our concerns with the rights and dignity of gay persons within the AFSC . . .

In making this statement the Board recognizes that we are all struggling to find non-exploitive and more fully loving ways of relating to each other. This is difficult in a society in which sexuality has often been used as a means for domination and control, rather than to deepen and strengthen loving relationships. In this search we will all need to call upon our most vital spiritual resources to grow together in the new understandings that will be required.

THE UNITARIAN UNIVERSALIST ASSOCIATION:

Discrimination Against Homosexuals And Bisexuals—1970:

RECOGNIZING THAT:

1. A significant minority in this country are either homosexual or bisexual in their feelings and/or behavior;

2. Homosexuality has been the target of severe discrimination by society and in particular by the police and other arms of government;

3. A growing number of authorities on the subject now see homosexuality as an inevitable sociological phenomenon and not as a mental illness;

4. There are Unitarian Universalists, clergy and laity, who are homosexuals or bisexuals;

THEREFORE BE IT RESOLVED: That the 1970 General Assembly of the Unitarian Universalist Association:

1. Urges all peoples immediately to bring an end to discrimination against homosexuals, homosexual-

ity, bisexuals, and bisexuality, with specific immediate attention to the following issues:

a. private consensual behavior between persons over the age of consent shall be the business only of those persons and not subject to legal regulations;

b. a person's sexual orientation or practice shall not be a factor in the granting or renewing of federal security clearance, visas, and the granting of citizenship or employment;

2. Calls upon the UUA and its member churches, fellowships, and organizations immediately to end all discrimination against homosexuals in employment practices, expending special effort to assist homosexuals to find employment in our midst consistent with their abilities and desires;

3. Urges all churches and fellowships, in keeping with our changing social patterns, to initiate meaningful programs of sex education aimed at providing a more open and healthier understanding of sexuality in all parts of the United States and Canada, and with the particular aim to end all discrimination against homosexuals and bisexuals.

THE RIGHT REVEREND PAUL MOORE, JR., Bishop for the Episcopal Diocese of New York:

On May 11, 1974, Bishop Moore addressed the 196th Convention of the Episcopal Diocese of New York and stated:

> Homosexuality is a condition which is given, not chosen. They, like every other minority, deserve to receive equal opportunity and justice before the law . . .

Quoting a July 1973 Report of the Commission on Homosexuality of the Diocese of Michigan, Bishop Moore added,

> We believe the church is that agency in history called upon to bear witness to the all embracing love of God. We have no evidence that this love does not include all homosexuals.

APPENDIX B

EXCERPTS FROM STATEMENTS OF OTHER CHRISTIAN AND JEWISH ORGANIZATIONS

THE EPISCOPAL CHURCH:

Resolution "On Homosexuality" of the Executive Council of the Episcopal Diocese of Michigan, May, 1974:

> 1. The Church should take steps to create an atmosphere of openness and understanding about human sexuality and particularly about homosexuality . . .
>
> 4. The Church's concern for individuals and a just social order should lead it to speak publicly for repeal of all laws which make criminal offenses of private, voluntary sex acts between mature persons. The Church ought also to oppose police harassment of homosexuals and investigatory practices which sometimes verge upon entrapment. Likewise the Church should speak publicly on behalf of homosexual persons in the area of civil rights' legislation. There should be no discrimination against any person and housing, employment, business services, or public accommodations on the grounds of sexual orientation.

Resolution of the Convention of the Episcopal Diocese of New York, May 11, 1974:

> *Whereas*, the Bishop of New York has called for justice and equal opportunity for homosexuals, and
>
> *Whereas*, the Bishop has given his support to a bill before the City Council designated as Intro. 2 as an effective means toward this goal, and

> *Whereas*, this Convention, without making any judgment on the morality of homosexuality, agrees that homosexuals are entitled to full civil rights,
>
> *Now therefore be it resolved*, that this Convention supports laws guaranteeing homosexuals all civil rights guaranteed to other citizens . . .

*Statement on Homosexuality, Protestant Episcopal Church in the U.S.A., General Convention, 1976:**

> Resolved, that it is the sense of this General Convention that homosexual persons are children of God, who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.
>
> This General Council expresses its conviction that homosexual persons are entitled to equal protection of the law with all other citizens, and calls upon our society to see such protection as provided in actuality.

THE LUTHERAN CHURCH IN AMERICA:

Statement on Sex, Marriage, and Family, Adopted by the Fifth Biennial Convention of the Board of Social Ministry, The Lutheran Church in America, Minneapolis, Minnesota, June 25—July 2, 1970:

> Human sexuality is a gift of God for expression of love and generation of life. As with every good gift, it is subject to abuses which cause suffering and

debasement. In the expression of man's sexuality, it is the integrity of his relationships which determines the meaning of his actions. Man does not merely have sexual relations; he demonstrates his true humanity and personal relationships, the most of intimate of which are sexual.

Scientific research has not been able to provide conclusive evidence regarding the causes of homosexuality. Nevertheless, homosexuality is viewed biblically as a departure from the heterosexual structure of God's creation. Persons who engage in homosexual behavior are sinners only as are all other persons —alienated from God and neighbor. However, they are often the special and undeserving victims of prejudice and discrimination in law, law enforcement, cultural mores, and congregational life. ***In relation to this area of concern, the sexual behavior of freely consenting adults in private is not an appropriate subject for legislation or police action.*** It is essential to see such persons as entitled to understanding and justice in church and community. (emphasis supplied)

THE AMERICAN LUTHERAN CHURCH:

*Statement on Homosexuality, The American Lutheran Church, Standing Committee for the Office of Research and Analysis, 1977:**

The Church need not be caught up in the conflicting theories as to how wide spread homosexuality is, the factors which cause or foster homosexuality, and whether it is an illness, an arrested state of sexual development, a form of deviant behavior, or sex-

ual expression of human nature. These are matters for the various scientific disciplines to debate and resolve. *The Church, however, is concerned that some human beings created in God's image are involved in homosexual behavior, that many people are hurting because of their own homosexuality or that of a loved one, and that the scriptures speak to the entire issue.*

We believe that taken as a whole, the message of scripture clearly is that:

a. Homosexual behavior is sin, a form of idolatry, a breaking of the natural order that unites members of the human community;

b. Homosexual behavior is contrary to the new life in Christ, a denial of the responsible freedom and service into which we are called through baptism;

c. God offers the homosexual person, as every person, a vision of the wholeness he intends, the assurance of His grace and His healing and restoration for the hurting and broken.

Nevertheless, we recognize the cries of our homosexual brothers and sisters for justice in the arena of civil affairs. We cannot endorse their call for legalizing homosexual marriage. Nor can we endorse their conviction that homosexual behavior is simply another form of acceptable expression of natural erotic or libidinous drives. *We can, however, endorse their position that their sexual orientation in and of itself*

should not be a cause for denying them their civil liberties.

THE UNITED METHODIST CHURCH:

*Statement on Homosexuality, The United Methodist Church, the Quadrennial Conference, 1976:**

> Homosexuals no less than heterosexuals are persons of sacred worth, who need the ministry and guidance of the Church in their struggles for human fulfillment, as well as the spiritual and emotional care of a fellowship which enables reconciliating relationships with God, with others and with self. Further we insist that all persons are entitled to have their human and civil rights ensured, though we do not condone the practice of homosexuality and consider this practice incompatible with Christian teaching.

THE UNITED CHURCH OF CHRIST:

Resolution on Homosexuals and the Law, Adopted by the Council for Christian Social Action of The United Church of Christ, April 12, 1969:

> Whereas homosexual practices between consenting adults in private endanger none of the properly protective functions of civil law; and
>
> Whereas laws against consensual homosexual practices between adults in private violate the right of privacy and are virtually unenforcebale, except through the abhorrent practices of police entrapment and enticement; and
>
> Whereas such laws have no effect on the degree of homosexuality (as indicated by various studies abroad showing that homosexuality exists to no greater extent in countries without such laws than in the United States); and
>
> Whereas present laws and government practices regarding employment and military service of homosexuals are based on false assumptions about the na-

ture of homosexuality in general and the danger of homosexuals to society in particular;

Therefore, the counsel for Christian Social Action (CCSA) hereby declares its opposition to all laws which make private homosexual relations between consenting adults a crime and thus urges their repeal.

Resolution Deploring the Violation of Civil Rights of Gay and Bisexual Persons, Adopted by the Eleventh General Synod, United Church of Christ, Washington, D.C., July 1-5, 1977:

WHEREAS, the Tenth General Synod declared by an overwhelming majority its commitment to an end to discrimination relating to sexual or affectional preference; and

WHEREAS in recent months we have witnessed the wide spread violation of the civil rights and gay and bisexual persons in the name of Christianity; and

WHEREAS, gay and bisexual persons have become victims of violence, including murder, allegedly as a result of fanatical prejudice kindled recently by those who publicly espouse and exploit irrational fear; and

WHEREAS, the recent referendum in Dade County, Florida represents a new reactionary movement which may eventually erode the civil liberties of all; and

WHEREAS, the United Church of Christ in its heritage and in its theology has a commitment to compassion for, and liberation of, oppressed minorities;

THEREFORE, BE IT RESOLVED, that this Eleventh General Synod:

1. Reaffirms the action of the Tenth General Synod in its pronouncement on Civil Liberties Without Discrimination Relating to Affection or Sexual Preference;

2. Deplores the use of scripture to generate hatred, and the violation of civil rights of gay and bisexual persons; and

3. Calls upon individual members, local churches, Associations, Conferences and Instrumentalities to continue to work for the enactment of civil rights legislation at the federal, state and local levels of government.

THE ROMAN CATHOLIC CHURCH:

Resolution on Civil Rights of Homosexual Persons by the National Federation of Roman Catholic Priests' Councils, House of Delegates Meeting, San Francisco, California, March 17-21, 1974:

WHEREAS, a significant minority in this country is homosexual in orientation and/or behavior; and

WHEREAS, gay persons have been the target of severe discrimination by society and in particular by the legal branch and other arms of government; and

WHEREAS, present laws and governmental practices regarding employment and prosecution of homosexuals are based on certain assumptions about the nature of homosexuality in general and the danger of homosexuals in particular; and

WHEREAS, a number of gay persons having children of their own, or involved in the education of children are many times denied the opportunity to raise and educate their children because they are homosexual in orientation, in spite of their parental or professional abilities;

BE IT RESOLVED, that the National Federal of Priests' Councils hereby declare [sic] its opposition to all civil laws which make consensual homosexual acts between adults a crime and thus urges their repeal; and

BE IT FURTHER RESOLVED, that the NFPC also express its opposition to homosexuality as such being the basis of discrimination against homosexuals in employment, governmental service, housing and child rearing involving natural or adoptive parents.

CHRISTIAN CHURCH (DISCIPLES OF CHRIST):

*Statement on Homosexuality, Christian Church (Disciples of Christ), General Assembly, Study Document, 1977:**

> . . . The standards of membership in the christian church (Disciples of Christ) have always rested on confession of faith in Jesus Christ and baptism. Its standards have been "inclusive" rather than "exclusive." In support of these it has appealed to the relationships of Jesus which were inclusive, often, in fact, deliberately directed to those whom society had demeaned and cast aside. It has never acknowledged barriers to fellowship on the basis of dogma or life style. By these principles, routed in biblical faith, it is difficult to point to any basis upon which homosexual persons might be excluded from membership.
>
> Acknowledging . . . the wide differences of opinion, there does seem to be a minimal consensus to which a church can strive: homosexuals are persons whom God created, loves and redeems and seeks to set within the fellowship of faith communities to be ministered to and to minister. The church can affirm that God's grace does not exclude persons of differing lifestyles or sexual preferences, nor does the church which is enlightened by the Holy Spirit. Homosexuals may be included in the fellowship and membership of the community of faith where they are to love and be loved and where their gifts of ministry are to be welcomed.

THE NATIONAL COUNCIL OF CHURCHES OF CHRIST:

Resolution on Civil Rights Without Discrimination as to Affectional or Sexual Preference, National Council of the Churches of Christ:

> The National Council of the Churches of Christ has always held that, as a child of God, every person is endowed with worth and dignity that human judgment cannot set aside. Therefore every person is entitled to equal treatment under the law.

For this reason, the National Council of the Churches of Christ has endeavored to ensure for all persons regardless of race, class, sex, creed, or place of national origin their full civil rights. To this list the Governing Board now adds affectional or sexual preference. Discrimination based on any of those criteria is morally wrong.

Many persons, including some of the members and pastors of some of our churches, have been and are being deprived of their civil rights and full and equal protection of the law because of their affectional or sexual preference.

THEREFORE:

1. The Governing Board reiterates the Christian conviction that all persons are entitled to full civil rights and equal protection and to the pastoral concern of the church.

2. The Governing Board urges its member churches and their constituencies to work to ensure the enactment of legislation at the national, state and local levels that would guarantee the civil rights of all persons without regard to their affectional or sexual preferences.

3. The Governing Board asks the General Secretary to request the appropriate units of the Council to gather for the Board's information work already done or in process in the communions on this subject and to explore the most effective ways of relating the theological insights of the churches on the effects of discrimination and prejudice into the lives of homosexual persons in the community and the churches.

THE AMERICAN JEWISH CONGRESS:

Resolution Adopted in 1973 by the American Jewish Congress

> As early as 1973, the American Jewish Congress called for decriminalization of homosexuality, and the removal of the cases of consenting adult homosexuals from the criminal justice system, except in cases involving disruption of the public order.

UNION OF AMERICAN HEBREW CONGREGATIONS:

*Statement on Homosexuality, Union of American Hebrew Congregations, General Assembly, 1977:**

> Whereas, the UAHC has consistently supported the civil rights and civil liberties of all persons, and
>
> Whereas, the Constitution guarantees civil rights to all individuals,
>
> Be it therefore resolved that homosexual persons are entitled to equal protection under the law. We oppose discrimination against homosexuals in areas of opportunity, including employment and housing. We call upon our society to see that such protection is provided in actuality.
>
> Be it further resolved that we affirm our belief that the private sexual acts between consenting adults are not the proper province of government and law enforcement agencies.

*Reprinted in Appendix, *Homosexuality and Ethics* 235-42 (E. Batchelor, ed. 1982).

NO. 85-140

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK AND JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, JOINED BY THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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NO. 85-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK AND JOHN AND MARY DOE,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, JOINED BY THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Robert Abrams, Attorney General of the State of New York, and John Van De Kamp, Attorney General of the State of California, submit this brief as *amici curiae* pursuant to Supreme Court Rule 36.4.

In *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981), the New York Court of Appeals held New York's criminal prohibition of consensual sodomy

unconstitutional on the grounds that it violated the rights of privacy and equal protection guaranteed by the Fourteenth Amendment. In *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983), *cert. dismissed*, 467 U.S. 246 (1984), the same court struck down New York's penal statute prohibiting loitering for the purpose of engaging in consensual sodomy, holding that the State may not punish inoffensive conduct anticipatory to sexual acts conducted in private between consenting adults. These decisions are consistent with basic constitutional principles limiting the intrusion of the state into the intimate affairs of its citizens. They have also removed a legal stigma from a large segment of New York's population.

Pursuant to their responsibilities as chief legal officers of their states, N.Y. Exec. Law § 63 (McKinney 1982); Cal. Gov. Code § 12511; and their authority to protect the civil rights and liberties of their states' citizens, *amici* urge this Court to rule that the Georgia statute criminalizing sodomy, Ga. Code Ann. § 16-6-2 (1982), implicates the right of privacy secured by the due process clause of the Fourteenth Amendment and must serve a compelling state interest to withstand constitutional scrutiny. A contrary decision could undermine the New York Court of Appeals' decisions in *People v. Onofre* and *People v. Uplinger* and would create a significant danger to the rights of New York's citizens to engage in sexual intimacy in their homes free from governmental interference and official stigma.

STATEMENT OF THE CASE

Michael Hardwick was arrested by the Atlanta police on the charge that he had violated Ga. Code Ann. § 16-6-2* by committing sodomy with a consenting male adult in the bedroom of his own home. After a preliminary hearing in the state court, the State of Georgia determined not to prosecute unless further evidence developed.

Respondent Hardwick, together with John and Mary Doe, a married couple, instituted this action for an order declaring unconstitutional Georgia's criminal sodomy statute. Petitioner moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court dismissed the complaint as to the Does on the grounds that they lacked standing. It also dismissed Hardwick's claim, on the merits, relying on this Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g* 403 F.Supp. 1199 (E.D. Va. 1975).

All three plaintiffs appealed to the Court of Appeals for the Eleventh Circuit. *Hardwick v. Bowers*, 760 F.2d 1202, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985). The Court of Appeals affirmed the district court's judgment dismissing the Does' claims for lack of standing. 760 F.2d at 1206-07. It reversed the dismissal of Hardwick's claims, finding that *Doe v. Commonwealth's Attorney* did not foreclose Hardwick's challenge to the statute, 760 F.2d at 1207-10, and that the statute implicated Hardwick's privacy interests, which it held were accorded substantive protection by the due process clause of the Fourteenth Amendment.

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* Ga. Code Ann. § 16-6-2 provides, *inter alia*:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another....
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years....

760 F.2d at 1210-13. Accordingly, the Court of Appeals remanded the case to the district court with instructions that it consider whether the State has a compelling interest in regulating consensual sexual activity between adults occurring in the seclusion of the home and whether Georgia's statute is the most narrowly drawn means of safeguarding that interest. 760 F.2d at 1213.

SUMMARY OF ARGUMENT

This Court has long recognized that the Constitution protects the individual's independence in making important decisions concerning intimate relationships. The purpose of this right of privacy, consistent with other constitutional objectives, is to protect against governmental intervention in and regulation of the conduct of intimate relationships. The right of privacy is strongest when it involves consensual sexual activities of partners to an intimate relationship which are conducted in the home. It creates a barrier to governmental intrusion into the conduct of intimate relationships.

Intimate sexual conduct in the home is constitutionally distinguishable from public or commercial conduct. While a statute which proscribes certain public or commercial conduct may be sustained merely upon a showing that the conduct offends the sensibilities of the majority, a statute such as Georgia's, which reaches private and intimate sexual conduct, can be sustained only upon a demonstration that it serves a compelling state interest.

ARGUMENT

THE GEORGIA STATUTE CRIMINALIZING PRIVATE SEXUAL ACTS INTRUDES UPON PERSONAL PRIVACY AND CAN BE SUSTAINED ONLY UPON A DEMONSTRATION THAT IT IS NARROWLY DRAWN TO FURTHER A COMPELLING STATE INTEREST

This case presents the issue of whether a state may criminally punish consenting adults who, in the seclusion of the home, engage in sexual intimacies that the state regards to be immoral. The New York State and California Attorneys General respectfully submit that the Court of Appeals correctly decided that the Fourteenth Amendment requires that a statute that reaches conduct so intimate, even in the marital bedroom, must be narrowly drawn to serve a compelling state interest.

This Court has recognized that the Constitution protects "zones of privacy" that safeguard the individual's "interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Nearly sixty years ago Justice Brandeis wrote eloquently of the right of privacy that is fundamental to American democracy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Respect for certain zones of privacy is not of recent origin. The cardinal sanctity of the home was well accepted in pre-Revolutionary English statutes and common law. *See Payton v. New York*, 445 U.S. 573, 596-97 (1980). More than a century

before the American Revolution, Sir Edward Coke pronounced that "a man's house is his castle, and one's home is to every man the safest refuge," Coke, *Third Part of the Institutes of the Laws of England*, 162 (1644), repeating dicta from the King's bench in *Semayne's Case*, 5 Coke's Reports 91a, 91b, 77 Eng. Rep. 194, 195-96 (K.B. 1603), that "the House of every one is to him his Castle and Fortress, as well for his Defence against Injury and Violence, as for his Repose...." Contemporaneously, Parliament decreed, and Charles I agreed, that free citizens could not be "compelled to receive [soldiers] into their houses, and thereto to suffer them to sojourn...." *The Petition of Right*, 3 Charles I, c. I (1628).

Later, the English Parliament sought to finance the Seven Years' War against France (in America, the French and Indian War) by imposing customs duties on the American colonies and excise taxes in Britain, and the government collected duties and taxes by entering homes under the infamous Writs of Assistance. The colonists rebelled at these acts, Tuchman, *The March of Folly*, 131-32 (1984), while in Parliament William Pitt was inspired to his immortal statement of principle:

> The poorest man in his cottage may bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement!

Hansard, *Parliamentary History*: XV 1307.

It is familiar history that the Crown's abridgements of the sanctity of the home were a profound motivating cause of the American Revolution and of the Framers' determination to found a government of limited powers. *Boyd v. United States*, 116 U.S. 616, 625 (1886). The provisions of the Bill of Rights were written to limit federal power, though federal power was already limited as a power ceded in specifics only – to the extent that many thought a Bill of Rights unnecessary. *E.g.*, Hamilton, *Federalist Papers*, Number 84 (1788). The power of the states,

however, was not inherently limited. Therefore, in applying the Bill of Rights to the states through the Fourteenth Amendment, the judiciary has construed its provisions to operate as effectively against the general powers of the states as against the specific federal powers. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

The constitutional right to be let alone, which has its origins in our common law traditions, *Poe v. Ullman*, 367 U.S. 497, 521, n.12 (1961) (Douglas, J., dissenting), as well as our Revolutionary experience, emanates from principles of limited government which are central to the Bill of Rights. Thus, this Court or individual Justices

> have found ... the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendment, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616 (1886); *see Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.*, at 386 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Roe v. Wade, 410 U.S. 113, 152 (1973).*

The Court has not placed any firm boundaries on this most basic right. *Carey v. Population Services, International*, 431 U.S. 678, 684-85 (1977). Instead, it has defined the right on a case-by-case basis in order to meet modern needs, exercising its judgment "upon interests of society pushing in opposite directions."

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* In *Roe v. Wade*, the Court concluded that the right of privacy is an element of liberty protected from state interference by the due process clause of the Fourteenth Amendment. 410 U.S. at 153.

Rochin v. California, 342 U.S. 165, 171 (1952). Thus, the right of privacy encompasses personal decisions relating to child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 267 U.S. 390 (1923); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); contraception, *Carey v. Population Services, International*; *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); family composition, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); abortion, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Roe v. Wade*; and the possession of obscene materials in the home, *Stanley v. Georgia*, 394 U.S. 557 (1969).

These decisions limit governmental intrusion into important private relationships, and imposition of governmental norms on individuals in matters concerning their intimate relationships. While the decisions in *Meyer* and *Pierce* establish that the due process clause protects a "private realm of family life which the state cannot enter", *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), they also stand for a broader principle. Under those decisions, a State may not act "to foster a homogeneous people", *Meyer v. Nebraska*, 262 U.S. at 402, or "to standardize its children", *Pierce v. Society of Sisters*, 268 U.S. at 535. Similarly, in *Moore v. City of East Cleveland*, the Court, while recognizing that it is the family through which "we inculcate and pass down many of our most cherished values, moral and cultural," held that the due process clause forbids the State from "standardizing its children – and its adults – by forcing all to live in certain narrowly defined family patterns." *Id.*, 431 U.S. at 504-06. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 843-44 (1977).

Recent decisions protecting the right to use and receive contraceptives, and to abortion, prevent the state from imposing a majority judgment that sanctions only those sexual intimacies that result in reproduction. When legislation prohibiting the use of contraceptives was struck down in *Griswold v. Connecticut* on the ground that it interfered with the marital relationship, "a relationship lying within the zone of privacy created by several

fundamental guarantees", 381 U.S. at 485, the Court recognized the right "to make decisions with respect to the consequence of sexual encounters and, necessarily, to have such encounters." *People v. Onofre*, 51 N.Y.2d at 487, 434 N.Y.S. 2d at 950. A majority of the members of this Court participating in *Eisenstadt v. Baird* agreed that the right to engage in non-procreative sexual activity could not be limited to those who had entered into a marriage relationship sanctified by the state:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

405 U.S. at 453 (emphasis in original). *See Carey v. Population Services, International*, 431 U.S at 686-89; *Doe v. Duling*, 603 F. Supp. 960, 967 (E.D. Va. 1985) ("[T]he constitutional right to privacy extends to a single adult's decision whether to engage in sexual intercourse"). And *Roe v. Wade* and its progeny recognize that the right of privacy is broad enough to encompass the decision of an individual woman, married or not, to have an abortion, because the State should not be permitted to impose upon the individual the intimate associations of marriage and family by compelling her to bear a child.

The right of privacy, vigorously enforced by this Court as a barrier to state efforts to require uniformity in the development and conduct of intimate associations, prohibits the imposition of majoritarian views concerning whom or when we may marry, *Loving v. Virginia; Zablocki v. Redhail*; how we exercise our physical and emotional intimacies, *Griswold v. Connecticut; Stanley v. Georgia*; whether and when to bear a child, *City of Akron v. Akron Center for Reproductive Health; Roe v. Wade*; and what

ideas and values we pass on to our children, *Meyer v. Nebraska; Pierce v. Society of Sisters*. It shares a common purpose with the rights of speech and association protected by the First Amendment:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Protection from governmental regulation of sexual conduct* is especially appropriate when that conduct occurs in the home. Given the pervasive Anglo-American legal, political and philosophical concern during the colonial period for the sanctity of the home, the founders of our Republic could not have contemplated a government with authority to reach into the home to regulate the conduct of intimate relationships. This Court so recognized in *Stanley v. Georgia*, permitting Stanley to possess and view in the privacy of his home materials that Georgia might forbid him to possess or view so freely elsewhere: "Whatever may be justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's home ...." 394 U.S. at 565. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) (explaining *Stanley* as "a reaffirmation that 'a man's home is his

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* Numerous courts, in addition to the Court of Appeals for the Eleventh Circuit, have found that acts of sexual intimacy are entitled to protection from government regulation. *E.g.*, *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1384 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Beller v. Middendorf*, 632 F.2d 788, 807-10 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); *Doe v. Duling*, 603 F.Supp. at 966-69; *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3535 (1985); *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 989 (1971); *People v. Onofre*; *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977).

castle' "); *Griswold v. Connecticut*, 381 U.S. at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to notions of privacy"). The home, and especially the intimacy of sexual relations in the home, must be treated as a "zone of prima facie autonomy, of presumptive immunity from regulation...." Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1425 (1974).

In short, private consensual sexual conduct, which implicates both the kinds of personal decisions previously protected by this Court and the protected zone of the home, is shielded by the right of privacy from governmental intrusion.* The presumption that sexual conduct in the home is immune from regulation is not easily overcome; the constitutional privacy and autonomy cases require a compelling state interest. *Roe v. Wade*, 410 U.S. at 155; *Eisenstadt v. Baird*, 405 U.S. at 463-64 (White, J., concurring). Close judicial scrutiny is especially appropriate to protect the privacy rights at issue here because of the "unreliability of the political process in regard to them." Henkin, 74 Colum. L. Rev. at 1429; *see Baker v.Carr*, 369 U.S. 186 (1962).**

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* Application of privacy protection to consensual adult sexual conduct in the home or similar place of seclusion will not undermine legislation regulating public or coercive sexual conduct. Public sexual conduct, even by consenting adults, regardless of their sex or marital status, is a legitimate subject of governmental regulation, *Paris Adult Theatre I v. Slaton*, 413 U.S. at 66, n.13; *see* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L.Rev. 670, 725-26 (1973). Similarly, conduct involving physical harm or coercion may legitimately be proscribed by the state. *See Rose v. Locke*, 423 U.S. 48, 50, n.3 (1975).

** The experience of New York State is instructive. A blue-ribbon panel of legislators and constitutional scholars charged with re-codification of the New York Penal Law proposed a code which omitted the provisions that had criminalized consensual "sodomy" and "adultery." At subsequent public hearings, the panel unanimously defended the omissions against religious and moral attacks on the ground that such provisions invade "private morality" and serve "no salutary purpose." Proposed New York Penal Law, 343-44 (1964); 1965 New York State Legislative Annual 51-52; State Temporary Commission on the Revision of the Penal Law and Criminal Code, Hearings of November 23, 24, and

(footnote continued)

The State's desire to impose a standard of morality does not suffice. This is so because governmental intrusion into intimacies conducted in the home does not "advance the concept of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State." *People v. Onofre*, 51 N.Y.2d at 490, 434 N.Y.S.2d at 952. Neither the length of time that the majority has held its moral conviction nor the passion with which it has expressed it withdraw legislation enforcing it from this Court's scrutiny.* For, if those considerations required judicial restraint, laws implementing long and deeply held sentiments favoring criminalization of contraception or abortion, or, indeed, favoring racial segregation in marital relations or education would be immune from review under the Fourteenth Amendment. *See Griswold v. Connecticut; Roe v. Wade; Loving v. Virginia; Brown v. Board of Education*, 347 U.S. 483 (1954).**

25, 1964, 464-65, 642, 650, 652. In order to gain passage for the much needed code revision, New York's legislative leaders and Governor found it necessary to restore the omitted provisions, *see* N.Y. Penal Law §§ 130.38 (McKinney 1975), 255.17 (McKinney 1980), stating that they were doing so without regard to the "merits" of the reinstated provisions. 1965 New York Laws, chapters 1030, 1037 and 1038; 1965 New York Legislative Annual, 531. Judicial action, and strict scrutiny of the statutory sections, was necessary to eliminate them. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dept.), *aff'd*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

* In *Roe v. Wade* this Court acknowledged its "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, ... and of the deep and seemingly absolute convictions that the subject inspires" but recognized that its task was "to resolve the issue by constitutional measurement, free of emotion and of predilection." 410 U.S. at 116.

** The New York Court of Appeals in *Onofre* noted the view that consensual sodomy is immoral and, as such, could be prohibited by the legislature. The court held, however, that morality in personal decision-making, when the outcome creates no harm to anyone, may not be legislated:

> We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is

(footnote continued)

The touchstone here is whether the intimate conduct is innocent of "demonstrated harm." *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (lst Cir. 1970), *aff'd*, 405 U.S. 438 (1972); Gerety, *Redefining Privacy*, 12 Harv.Civ.Rts.-Civ.Lib.L.Rev. 234, 274-78 (1977). This Court has recognized that the state's moral judgment may intrude upon the conduct of consenting adults only where the conduct "has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the States' 'right to maintain a decent society.' " *Paris Adult Theatre I v. Slaton*, 434 U.S. at 69 *quoting Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, Ch. J., dissenting). The Georgia statute unselectively criminalizes and severely punishes not only the conduct involved here but other conduct widely regarded as innocent and engaged in by a substantial majority of Americans. *See* Kinsey, Pomeroy & Martin, *Sexual Behavior in the Human Male*, 371, 577 (1948); Kinsey, Pomeroy, Martin & Gebhard, *Sexual Behavior in the Human Female* 257-58, 588 (1953).* Enforcement of such a statute regulating intimate, consensual conduct in the home may breed contempt for the legitimacy of the law.

Recognition of privacy rights here will not preclude "closure of bathhouses and sexually facilitating bars and parks...." Brief of David Robinson, Jr., as Amicus Curiae in Support of Petitioner, 33-34. Treatment of public or commercial establishments which

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> whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

51 N.Y.2d at 488, n. 3, 434 N.Y.S.2d at 951, n. 3.

* "[N]o legislation or social taboos have been able to eliminate [non-reproductive sexual conduct] from the history of the human animal." *Sexual Behavior in the Human Male*, at 578.

promote and profit by promiscuous, anonymous sexual activity is plainly distinguishable from regulation of consensual activity in private homes, both as a matter of constitutional privacy protection and as a matter of public health. *See, e.g.*, Sheretz, *Acquired Immune Deficiency Syndrome: A Perspective for the Medical Practitioner*, 69 Medical Clinics of North America 637 (1985) ("sexual promiscuity is probably the most important risk factor").* However, a statute that regulates sexual conduct in order to further public health interests should be narrowly drawn to further those interests. It is not likely that a statute that proscribes private, sexual conduct in a relationship of even the most enduring monogamy is one motivated by concern for the partners' or the public's health or safety. *See Carey v. Population Services, International*, 431 U.S. at 689-91; *Eisenstadt v. Baird*, 405 U.S. at 451-52.

Those who urge this Court to defer here, under the principles of "separation of powers" or "federalism", *see* Pet. Br. at 31, to the majoritarian judgment of state legislatures overlook the wisdom expressed by the Framers in adopting the Bill of Rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

West Virginia Board of Education v. Barnette, 319 U.S. at 638.

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* New York State, for instance, recognizes this distinction. *Compare People v. Onofre* (holding "noncommercial private" sexual activity to be protected) with *City of New York v. The New Saint Mark's Baths*, 1/8/86 N.Y.L.J., p. 6, col. 3 (Sup. Ct. N.Y. Co.) (unreported decision sustaining N.Y. Admin. Code Tit. 10, Subpart 24-2 (1985), which authorizes closure of public establishments in which "high risk sexual activity" is found to occur; relying on *Paris Adult Theatre I* in rejecting challenges based on *Griswold*, *Stanley* and *Onofre*.)

It is the vigilant protection of personal liberty that is the majority's will, for it has been the judgment of this Nation that the freedom of all can be retained only if individuals are secured from governmental intrusions into their intimacies. This majoritarian value became part of our constitutional ethic when the states adopted the command of the Fourteenth Amendment: "nor shall any State deprive any person ... of liberty ... without due process of law." The Attorneys General of New York and California respectfully submit that constitutional democracy is best served by requiring states to demonstrate that compelling reasons exist for intruding upon sexual intimacies in the home and that those reasons are served by regulations narrowly drawn.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Dated: New York, New York
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In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

- v. -

MICHAEL HARDWICK, AND JOHN AND MARY DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

AMICUS CURIAE BRIEF ON BEHALF OF THE RESPONDENTS BY LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE FOLLOWING ORGANIZATIONS: GAY AND LESBIAN ADVOCATES AND DEFENDERS; THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK; THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION; AND THE GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, INC.

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INTEREST OF AMICI CURIAE

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. ("LAMBDA"), appearing as *amicus curiae* with the written consent of the parties to the instant case, is a New York nonprofit corporation, and is the oldest and largest national gay and lesbian legal organization in the country. LAMBDA was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LAMBDA Certificate of Incorporation ¶2.2(a).

LAMBDA has appeared as counsel of record or as *amicus curiae* in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, and in cases that have challenged laws, regulations, or private actions which discriminate against or restrict the basic civil and constitutional rights of gay men and lesbians.

LAMBDA thus has a strong interest in this case, and submitted an *amicus curiae* brief to the United States Court of Appeals for the Eleventh Circuit on behalf of the respondents Michael Hardwick and John and Mary Doe. LAMBDA is particularly concerned about the far-ranging, damaging impact of statutes such as the one challenged herein, which criminalize private, consensual, adult sexual conduct and which have an especially adverse impact on lesbians and gay men.

GAY AND LESBIAN ADVOCATES AND DEFENDERS ("G.L.A.D."), incorporated in Massachusetts as Park Square Advocates, Inc., a nonprofit tax-exempt corporation, was founded to remedy the legal disabilities suffered by gay

men and lesbians and is dedicated to the abolition of restrictions on the civil rights of homosexuals in the United States. Through its written materials and public speaking, G.L.A.D. educates the lesbian and gay community, the legal community and the public at large concerning the legal problems suffered by lesbians and gay men and the remedies available for those problems. Through its public interest litigation, G.L.A.D. participates in civil and criminal cases involving lesbians and gay men who have been discriminated against on the basis of their sexual orientation and works to vindicate and expand lesbian and gay civil rights.

THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK ("ASSOCIATION") is a professional association of the legal community concerned with the rights of lesbians and gay men. The ASSOCIATION pursues its purposes through provision of legal services on a *pro bono* basis within the lesbian and gay community, educational programs, a legal newsletter, and cooperation with community organizations such as Gay Men's Health Crisis, Inc., and national legal organizations such as LAMBDA.

THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION is a state-wide organization of lesbian and gay attorneys dedicated to the fair and just treatment of lesbians and gay men under the law. Its purposes include taking action on questions of law in the administration of justice, promoting the issue of human rights, and combatting discrimination.

The GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, INC. ("ALLIANCE"), a Delaware nonprofit corporation, seeks to identify and respond to public expressions of homophobia and bigoted and misinformed statements concerning gay and lesbian people; and to se-

cure justice and fair treatment for all people, regardless of age, race, creed, profession, sex, national origin or sexual orientation. A national organization, the Alliance is headquartered in New York City and works closely with other public interest and civil rights organizations and with the media.

All of the organizations which have joined LAMBDA in this *amicus curiae* brief share with LAMBDA a deep concern about statutes such as the one challenged herein, which penalize private, adult, consensual, noncommercial sexual conduct, and thus severely impact on millions of Americans, gay and non-gay alike.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly ruled that the right to privacy embraces both the decision to engage in private sexual activity, including oral and anal sexual contact, and the choice of an adult sexual partner, including one of the same sex. The Constitution leaves such intimate personal matters of vital importance to the individual up to each person, free of unwarranted intrusion by the state. This privacy right is not confined to choices regarding procreation, and does not only protect married people.

The state's characterization of same-sex intimacy as aberrant, and therefore without constitutional protection, is false. First, intimate sexual behavior between people of the same sex is not aberrant; it is a healthy and natural expression of love and erotic interest for literally millions of people. Second, there is no social consensus that condemns same-sex activity or those who engage in it; most Americans live in jurisdictions which have eliminated criminal sanctions such as Georgia's, and most believe that the choice to engage in private sexual

activity, same-sex or otherwise, is just not the government's concern. Third, social disapproval, fear, and prejudice cannot override constitutional protection for the individual's choice of intimate association.

Before the government can regulate or penalize private sexual activity between consenting adults, it must demonstrate a compelling state interest based on a showing of real harm, and must tailor its response to minimize its interference with that fundamental right. This Court should hold the state to its constitutional obligation to show a compelling interest in support of its massive curtailment of its citizens' right to sexual privacy and intimate association.

ARGUMENT

POINT I

THE RIGHT TO PRIVACY PROTECTS THE INDIVIDUAL'S DECISION TO ENGAGE IN PRIVATE SEXUAL ACTIVITY AND TO CHOOSE A CONSENTING ADULT PARTNER, INCLUDING A PERSON OF THE SAME SEX.

The right to privacy protects each adult individual's freedom of intimate association and choice to engage in private sexual activity, including such association and activity with a partner of the same sex. *See Roberts v. United States Jaycees*, 468 U.S. —, 104 S.Ct. 3244, 3249-51 (1984). This privacy right stems from the underlying value of individual freedom, the moral context of the Constitution. It is rooted in a line of cases almost one hundred years old. *See Roe v. Wade*, 410 U.S. 113, 152 (1973). The logic of those cases makes clear that the personal decisions of adults regarding sexual activity and intimate association in the home "are essentially private and beyond the legitimate reach of a civilized society." *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir.), *cert. granted*, — U.S. —, 106 S.Ct. 342 (1985).

The state seeks, erroneously, to limit the holdings of this Court to the narrow areas of procreation and marriage. (Brief at 25). This view is too restrictive; it would read unmarried individuals out of the Constitution. Moreover, it cannot be harmonized with the cases, which reject an emphasis on procreation and rightly focus on the importance to the individual of the choices in question. It cannot be that only married people are protected by the Constitution, or that the only important decision left to one's autonomous choice in this free society is that regarding procreation. Rather, the privacy of these personal decisions and intimate associations must be respected by the state because of the significance of sexuality in adult private life, and because of what it means to be free.

The Eleventh Circuit correctly held that the Georgia statute infringes on the right to privacy. It recognized this nation's basic commitment to governmental non-intervention with personal choice. *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). The decision to engage in private sexual activity with a person of the same sex is such a choice, and must be protected as an aspect of the individual's right to privacy and freedom of intimate association.

A. The Privacy Right Protects Each Individual's Choice of Sexual Partner and Private Sexual Activity.

The "force and rationale", *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977), of this Court's privacy cases[1] require that private sexual activity between partners

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1. While the right of privacy was first denominated twenty years ago in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the concept of such an autonomy right had developed for many years prior to that case "[i]n a line of decisions . . . going back perhaps as far as *Union Pacific R.R. Co. v. Botsford* . . . (1881)." *Roe v. Wade*, 410 U.S. 113, 152 (1973).

of the same sex be protected as a fundamental right.[2] *Hardwick*, 760 F.2d at 1202; *People v. Onofre*, 51 N.Y. 2d 476, *cert. denied*, 451 U.S. 987 (1980). Those cases concern personal decisions about one's physical person and intimate association with others, and repudiate the notion that social conformity or the state's coercive power should take precedence over individual freedom in such private matters.[3]

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2. Several courts have held that the right to privacy protects private sexual conduct between consenting adults. *See State v. Saunders*, 75 N.J. 20, 381 A.2d 333 (1977); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *State v. Hill*, 166 N.J. Super. 224, 399 A.2d 667 (Law Div. 1978); *see also Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974); *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) ("sodomy" statute struck down on equal protection grounds; privacy issue not reached); *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) *(en banc)*, *cert. petition filed*, No. 85-1225 (Jan. 18, 1986). *But see Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 90 (1976).

3. "[T]here is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to full protection as an aspect of the individual's right of privacy." *Beller v. Middendorf*, 632 F. 2d 788, 809 (9th Cir. 1980), *cert. denied sub nom. Beller v. Lehman*, 425 U.S. 905 (1981). *See, e.g.*, Bazelon, *Probing Privacy*, 12 Gonz. L. Rev. 587, 616-17 (1977); Craven, *Personhood: The Right to Be Let Alone*, 1976 Duke L.J. 699 (1976); Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L.L. Rev. 233 (1977); Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 682-8 (1980); Lasson, *Civil Liberties for Homosexuals: The Law in Limbo*, 10 Dayton L.Rev. 645 (1985); Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right To Be Let Alone*, 10 Dayton L.Rev. 705 (1985); Note, *Griswold Revisited In Light of Uplinger: An Historical and Philosophical Exposition of Implied Autonomy Rights in the Constitution*, 13 N.Y.U. Rev. L. & Soc. Change 51 (1984-85); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957, 1014-18 (1979); Tribe, *American Constitutional Law* § 15-13 (1978 and Supp. 1979); Wilkinson & White, *Constitutional Protection for Personal Lifestyle*, 62 Cornell L. Rev. 563 (1977); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 Mich. L. Rev. 1613, 1637 (1974).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court struck down a state attempt to restrict the sexual activity of married individuals to conduct having a procreative purpose or potential. The Court focused on the "notions of privacy surrounding the marriage relationship," and rejected "traditional" arguments, decoupling the decision to engage in sex from the decision to procreate.[4] *Id.* at 486.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court made clear that the right of privacy inheres in the individual, and is not confined to the marital relationship.

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (original emphasis). Under the Constitution, states may not bar access to contraception in order to burden the private individual choice of unmarried persons to engage in sexual activity. Such a choice is properly made by the individual, not by the state. *Id.*

In *Roe v. Wade*, 410 U.S. 113, this Court linked the Constitution's prohibition of unjustified governmental infringement on the choice to engage in sexual activity with

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4. Two years later, this Court held that the government could not infringe the fundamental right to marry even to prevent a feared "corruption of blood" resulting from sexual relations between people of different races. *Loving v. Virgina*, 388 U.S. 1 (1967). As in *Griswold*, the facts in *Loving* involved a married couple, but the logic of the case was not limited to formal marital status. "In effect, the *Loving* Court held that a state may not prohibit adults from voluntarily entering into a legal relationship in which, under *Griswold*, their right of private sexual intimacy would be protected." *Miller v. Rumsfeld*, 647 F.2d 80, 84 (9th Cir. 1981) (Norris, J., dissenting from denial of rehearing *en banc*).

the individual's basic right of control over intimate decisions regarding his or her own body. The Court subsequently held that the fundamental right to engage in nonprocreative sexual activity extends even to minors. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Services International*, 431 U.S. 678; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976). In so holding, this Court recognized that consideration of a privacy claim begins with an inquiry into the importance to the individual of a particular choice or conduct.

Eisenstadt and *Roe* make clear that the privacy right is not rooted in marriage or confined to issues of procreation.[5] In fact, *Griswold* demonstrates that under the Bill of Rights, sex and sexual privacy are for the individual's fulfillment, not for society's interest in procreation or family. 391 U.S. at 486 (marital relationship not just a means of reproduction, but also a "coming together . . . or way of life"). The marital association is significant not merely, indeed not even primarily, as a vehicle for reproduction, but rather, as an "opportunity for mutual support and self-expression."[6] *Hardwick*, 760 F.2d at 1212.

This opportunity, protected against state interference, is not found only in marriage or in "traditional" couplings.

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5. Furthermore, in *Kelly v. Johnson*, 425 U.S. 238, 244 (1976), while rejecting a police officer's challenge to a regulation regarding hair length, this Court made clear that the *Griswold* line of cases did not foreclose a privacy or "liberty interest" claim in other matters, such as personal appearance. The impact of the privacy cases is not confined to the factual settings of marriage, procreation, or family life. *See id.* at 249 (Powell, J., concurring); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

6. "It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection." *Lovisi v. Slayton*, 363 F. Supp. 620, 625 (E.D.Va. 1973), *aff'd on other grounds*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

The Constitution protects the family not because it fits some "traditional" conception of "the family", but because of the importance of such basic relationships to the individuals concerned. For those who choose to engage in same-sex intimacy, that choice is no less important.

The relationships gay people form as loving couples are indistinguishable from anyone else's in intimacy, aspiration, caring, support, stability, and significance.[7] Blumstein & Schwartz, *American Couples* 45 (1983) ("'Couplehood', either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals."). Because "[a] mature individual's choice of an adult sexual partner, in the privacy of his or her own home, [is] a decision of the utmost private and intimate concern," *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1203 (Merhige, J., dissenting), there is no logical reason to exclude his or her personal decision from the "rational continuum," *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), of personal freedom protected by the constitutional right to privacy.

The Georgia statute is particularly offensive because it invades the sanctity of the home and permits the state to police and prevent the most intimate adult activities even when conducted in private. As this Court stated in *Stanley v. Georgia*, 394 U.S. at 565, "[w]hatever may be the justifications for [statutes regarding activity in public] we do not think they reach into the privacy of one's own home." *See*

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7. The term "homosexual" denotes people who have a sexual orientation and emotional attraction for others of the same sex. "Gay" and "lesbian" describe people who identify themselves—whether to themselves alone or, in varying degrees, to others—as having such homosexual orientation. *See* Paul and Weinrich, "Whom and What We Study," *Homosexuality: Social, Psychological and Biological Issues* 23 (Paul ed. 1982) (hereafter: *"Homosexuality"*).

also Payton v. New York, 445 U.S. 573, 589-90 (1980) (constitutional protection reaches its height when the state seeks to regulate activity in the home).

In *United States v. Orito*, 413 U.S. 139 (1973), this Court recognized that the location of activity can affect the degree of protection afforded it, regardless of whether it has been specifically identified as a protected activity. "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." *Id.* at 142 (Burger, C.J.). In particular, this Court has defended "the right to satisfy . . . emotional needs in the privacy of [one's] own home." *Stanley*, 394 U.S. at 515.

The state argues that it may prohibit same-sex intimacy as well as all oral and anal sexual contact because of its view that society condemns such activities. (Brief at 19-24, 31). This argument is wrong for two reasons. First, there is no such social consensus. For example, half the states have decriminalized private sexual activity between adults of the same sex.[8] *See* discussion in Point II.

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8. Alaska (1978 ASL § 21, ch. 166, eff. 1/1/80); California (1975 Cal. Stat., ch. 71, § 7, eff. 7/1/76); Colorado (1971 Colo. Sess. Laws, ch. 121, § 1, eff. 1/1/72); Connecticut (1969 Public Act 828, § 214, eff. 11/1/71); Delaware (58 Del. Laws, ch. 497, § 1, eff. 4/1/73); Hawaii (1972 Haw. Sess. Laws, Act 9, § 1, eff. 1/1/73); Illinois (1961 Ill. Laws, p. 1983, § 11-2, eff. 1/1/73); Indiana (1976 Ind. Act. P.L. 148, § 24, eff. 7/1/77); Iowa (1976 Ia. Acts, ch. 1245, § 520, eff. 1/1/78); Maine (1975 Me. Acts, ch. 499, § 5, eff. 5/1/76); Nebraska (1977 Neb. Laws, L.B. 38, § 328, eff. 7/1/78); New Hampshire (1973 N.H. Laws, § 532:26, eff. 11/1/73); New Jersey (1978 N.J. Laws, ch. 95, § 2C:98-2, eff. 9/1/79); New Mexico (1975 N.M. Laws, ch. 109, § 8, eff. 1/1/76); New York (law held unconstitutional on privacy and equal protection grounds, *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981)); North Dakota (1977 N.D. Sess. Laws, ch. 122, § 1, eff. 1/1/78); Ohio (1972 Ohio Laws, 134 v. H 511, § 2, eff. 1/1/74); Oregon

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Second, social disapprobation cannot override constitutional protections for individual choice. *E.g., City of Cleburne v. Cleburne Living Center*, — U.S. —, 105 S.Ct. 3249 (1985); *Palmore v. Sidoti*, — U.S. —, 104 S.Ct. 1879 (1984).

Because the choice of an intimate sexual activity or of a sexual partner is so keenly personal and important to the individual, the Constitution protects the individual's right to choose even if a majority disapproves of the decision he or she makes. *See Onofre*, 51 N.Y.2d 476; *see also* Bazelon, *Probing Privacy*, 12 Gonz. L. Rev. at 616-17. *Griswold*, *Eisenstadt*, and *Roe*, among others, all demonstrate that society's judgment that an activity is "immoral" cannot sustain a statute which interferes with protected private choices.

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds," *Stanley*, 394 U.S. at 565, including their right to choose an adult sexual partner and intimate activity that does not harm others.

> The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). More recently, this Court has stated that "our nation . . . has thrived on the principle that,

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(1971 Ore. Laws, ch. 743, § 432, eff. 1/1/72); Pennsylvania (*Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980)); South Dakota (1976 S.D. Sess. Laws, ch. 158, § 22-8, eff. 4/1/77); Vermont (1977 Vt. Acts, No. 51 § 3, eff. 7/1/77); Washington (1975 Wash. Laws, 1st Exec. Sess., ch. 260, eff. 6/1/76); West Virginia (1976 W. Va. Acts, ch. 43, eff. 6/1/76); Wisconsin (Wis. Stat. Ann. § 944.17, eff. 5/12/83); Wyoming (1977 Wyo. Sess. Laws, ch. 70, § 3, eff. 5/27/77).

outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

The privacy right reflects the underlying conception of the proper balance between self and society which gives meaning to the American constitutional design. It limits the extent to which government action and majority disfavor may infringe upon individual choice. The privacy right protects the individual's intimate personal choices, however popular or unpopular, unless actual social harm is shown. Thus, this Court has upheld the right to use contraception, *Griswold*, to use pornography, *Stanley*, and even to have children study a once-despised foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Surely, an adult's interest in deciding to engage in a particular sexual activity or choosing a partner is of no less significance. Unless this Court "closes [its] eyes to the basic reason why certain rights have been accorded shelter under the Fourteenth Amendment's due process clause," *Moore*, 431 U.S. at 501, and the right to privacy, it cannot escape the application of the "force and rationale" of those precedents regarding sexuality and intimate association to find that the right to privacy protects private sexual activity between adults, including such activity between adults of the same sex.

B. Millions of Americans Engage in Private Sexual Activity With Partners of the Same Sex, and That Behavior is Widely Recognized as a Natural and Healthy Expression of Intimacy.

In every respect, intimate associations between men and men and women and women reflect the precious values protected by the right to privacy, and meet the criteria de-

fining protected "intimate associations" discussed in *Roberts v. United States Jaycees*, 104 S.Ct. at 3249-51.

> [C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme . . . [, because] they . . . foster diversity[, because] individuals draw much of their emotional enrichment from close ties with others [, and because such relationships] safeguard the ability independently to define one's identity central to any concept of liberty.

Id. at 3249-50. Americans must be free to engage in constitutionally protected sexual activity with others of the same sex, if that is their desire, as it is for literally millions.

In 1948, research first demonstrated that at least ten percent of the American male population had a sexual orientation and emotional attraction for, and engaged in sexual conduct with, other men. Kinsey, Pomeroy, Martin, & Gebhard, *Sexual Behavior in the Human Male* (1948). More recent research suggests that the incidence of same-sex sexual activity has not shifted measurably since the Kinsey studies, despite changes in social attitudes and a major trend toward decriminalization of sexual activity between adults of the same sex.[9] One recent study conservatively estimates that over five million Americans are exclusively sexually oriented to others of the same sex, while a far larger number of people engage in occasional sexual ac-

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9. *See, e.g.*, Gebhard, "Incidence of Overt Homosexuality in the U.S. and Western Europe," National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers*, DHEW Publication No. 72-9116 (HSM) (Livingood ed. 1972); Gebhard & Johnson, *The Kinsey Data: Marginal Tabulations of the 1938-1963 Interviews Conducted By the Institute for Sex Research* (1979); Hunt, *Sexual Behavior in the Seventies* (1974); Katchadourian & Lunde, *Fundamentals of Human Sexuality* (1975). For the states that have decriminalized private same-sex sexual activity, see note 8.

tivity with others of their sex. Francoeur, *Becoming A Sexual Person* (1982). Some researchers have concluded that the non-exclusive homosexual population includes at least twenty-five million men and women. Paul, "Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument," *Homosexuality* 25-26.

Although it is unknown why some people have a same-sex orientation while others do not, the consensus of expert authority is that sexual orientation has already developed by a very early age, independent of isolated sexual experiences. *See, e.g.*, Bell, Weinberg & Hammersmith, *Sexual Preference: Its Development in Men & Women* (1981); Marmor, ed., *Homosexual Behavior: A Modern Reappraisal* (1980); National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972); Karlen, *Sexuality and Homosexuality* 572-606 (1971). Moreover, people who engage in same-sex sexual activity constitute an extremely diverse population, indistinguishable in all other respects from people who do not. *See* Bell & Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 195-231 (1978) (hereafter, *Homosexualities*); Churchill, *Homosexual Behavior Among Males* 36-59 (1967); Tripp, *The Homosexual Matrix* (1975). Like the phenomenon of heterosexual attraction, same-sex orientation is not going to change and is not going to disappear.

Sexual activity between people of the same sex occurs often in a variety of societies around the world. Carrier, "Homosexual Behavior in Cross-Cultural Perspective," *Homosexual Behavior: A Modern Reappraisal* (1980); Ford & Beach, *Patterns of Sexual Behavior* (1951). It has existed throughout the ages. *See, e.g.*, Boswell, *Christianity, Social Tolerance, and Homosexuality* (1980); Bullough, *Homosexuality: A History* (1979). Some cultures have idealized it, others condemned it, others merely tolerated it or remained indifferent. Re-

gardless of the prevailing social attitude, however, same-sex intimacy and people of homosexual orientation have existed as a substantial and ubiquitous part of human affairs.[10]

Same-sex coupling is thus both natural and desirable to many Americans, indeed to many people in most societies in most historical eras.[11] Moreover, same-sex

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10. Contrary to the state's allegations, even in Western society there has been a considerable range of tolerance for homosexual people and sexual activity between people of the same sex. *See, e.g., Boswell,* Chs. 1 and 2; Bullough, *Sexual Variance in Society and History* (1976). Most European nations have either never had laws against same-sex sexual conduct or have repealed them. The Soviet Union and many of its satellites, by contrast, strongly condemn and repress same-sex sexual activity. Katchadourian & Lunde, *Fundamentals of Human Sexuality* 511. At present, the Soviet Union and the United States are the only major countries in Europe and North America still penalizing such conduct. The European Court of Human Rights has declared that the internationally recognized right to privacy protects an adult's freedom to engage in consensual sexual activity with the partner of his or her choice. Eur. Court H.R., Series B, No. 40, *Dudgeon* Case at 40.

11. In its invocation of "traditional" condemnation as a support for its position, the state fails to complete the historical picture. (Brief at 21-22). For example, the original edicts against same-sex sexual activity declared that such behavior was the cause of earthquakes, floods, and plague. *See* Justinian, *Novellae* 77 and 11, reprinted in Bailey, *Homosexuality and the Western Christian Tradition* 73-75 (1955). Blackstone cites Sodom and Gomorrah in support of the death penalty for same-sex sexual acts. 4 *Commentaries* (Beacon Press 1962). Aquinas and Augustine condemned contraception as vehemently as homosexuality. *See, e.g.,* Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1966). Similar attitudes prevailed regarding divorce and heresy. The state's contention that such "traditions" and sources should outweigh American values of freedom and the Constitution's protection of the individual's right to make such choices privately is absurd. Unfortunately, courts still cite to such sources, including references to Sodom, in support of laws such as the Georgia statute. *See, e.g., Dawson v. Vance,* 329 F. Supp. 1320, 1322 (S.D. Tex. 1971); *Doe v. Commonwealth's Attorney,* 403 F. Supp. at 1202. Meaningful, heightened scrutiny is necessary to prevent such unconstitutional acquiescence in irrational state intrusion. *See* discussion in Point II.

sexual activity, including oral and anal contact, does not deviate from any biological norm. Oral and anal sex are themselves biologically natural forms of sexual expression.[12] After a long period of ignorance and resultant hostility, today most mental health professionals no longer consider same-sex orientation and behavior to be a mental disorder.

In 1973, the American Psychiatric Association declared that homosexuality *per se* implies "no impairment in judgment, stability, reliability, or general social or vocational capabilities." The Association concluded that "[i]n the reasoned judgment of most American psychiatrists today, homosexuality *per se* does not constitute any form of mental disease." Resolution of the American Psychiatric Association, December 15, 1973. Two years later, the American Psychological Association and American Public Health Association passed similar resolutions urging the eradication of the myths and prejudice stigmatizing same-sex orientation. Resolution of the Council

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12. Oral and anal sexual contact are statistically extremely common among both heterosexual and same-sex couples. Kinsey's research showed that fifty-four percent of exclusively or predominantly heterosexual men and forty-nine percent of exclusively or predominantly heterosexual women often engage in the sexual conduct prohibited by the Georgia statute. Kinsey, *Sexual Behavior in the Human Female* (1953); Kinsey, *Sexual Behavior in the Human Male* at 368-370. Sixty percent of married, college-educated people frequently engage in oral intercourse. *Id.* More recent research shows that approximately eighty percent of nonmarried men and women between the ages of twenty-five and thirty-four and ninety percent of young married couples engage in oral intercourse. Hunt, *Sexual Behavior in the Seventies* (1974). Twenty-five percent of the subjects under thirty-five years old in one study had engaged in anal intercourse in the year preceding the study. *Id.* Other nationwide research showed that thirty percent of the women interviewed enjoyed anal intercourse. Hite, *The Hite Report: A Nationwide Study on Female Sexuality* 76 (1976). Recent studies have concluded not only that oral and anal sex are pervasively practiced, but that couples which engage in such sexual expression are happier. Blumstein & Schwartz, *American Couples* 231, 240.

of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975).[13]

Because of the importance of private intimate expression and the futility and destructiveness of criminalization of such adult personal choice, many professional organizations have strongly advocated the repeal of statutes penalizing private sexual conduct between consenting adults. More than thirty years ago, the American Law Institute removed provisions such as Georgia's statute from its Model Penal Code, stating:

> The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences.

Model Penal Code, Art. 207.1 comment (1955).

In addition to the professional associations discussed above, the American Bar Association, American Medical Association, and National Association of Social Workers have all urged the repeal of such intrusive statutes.[14]

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13. The action of these organizations of mental health professionals followed a long process of evaluation and study by a large number of independent researchers. *See, e.g.*, Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Protective Techniques 17-31 (1957); Gonsiorek, *Results of Psychological Testing in Homosexual Populations*, 25 Am. Behav. Scientist 388, 394 (1982); Meredith & Riester, *Psychotherapy, Responsibility and Homosexuality: Clinical Examination of Socially Deviant Behavior*, 11 Professional Psychology 174-193 (1980); Riess, "Psychological Tests in Homosexuality," *Homosexual Behavior: A Modern Reappraisal*.

14. Resolution of the American Bar Association House of Delegates, Summary of Action 23 (Aug. 1973) (The ABA Section of Individual Rights and Responsibilities recommended this

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Many major religious organizations, regardless of their doctrinal position on homosexuality, have also opposed criminalization of private adult sexual choice.[15]

Finally, twenty-five states have eliminated their consensual "sodomy" statutes, most through legislative enactment, a few by judicial action. These states, like the experts and professional and religious groups discussed above, have all recognized that government has no place policing intimate, consensual behavior in the bedrooms of its citizens.

In the American constitutional scheme, choice of private sexual activity and adult partner must be left to the dictates of each individual and the persuasive powers of society, rather than the coercive power of the state. This Court should affirm the holding that the right to privacy

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Resolution, stating that "such laws impinge on the . . . privacy that surrounds each individual and serve no valid state purpose," 4 Human Rights 67 (1974)); Resolution adopted in lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report 84 (1975). *Cf.* American Sociological Association (ASA), Resolution of ASA Council (Jan. 1978) ("the American Sociological Association affirms its opposition to oppressve action against homosexuals and its commitment to their civil rights"); National Association of Social Workers, NASW Delegate Assembly (1977) ("The Association deplores and will work to combat archaic laws, discriminatory employment practices, and any of the forms of discrimination which serve to impose something less than equal status upon homosexually oriented members of the human family.").

15. These religious groups include the National Federation of Priests Councils (the largest association of Roman Catholic priests in the United States), the Union of American Hebrew Congregations, the United Church of Christ, the Lutheran Church of America, the Methodist General Conference, the Presbyterian Church (USA), the Society of Friends, the Episcopal Church, the American Baptists, the Unitarian-Universalist Church, and the National Council of Churches. Hiltner, "Homosexuality and the Churches," *Homosexuality: A Modern Reappraisel* (1980); Presbyterian Blue Book I & II, Report on the Church and Homosexuality (1978).

embraces such intimate decisions, and should require that the state meet its constitutional obligation either to demonstrate a compelling need for regulation or leave Americans free to make their own choices in life and love.

POINT II

BECAUSE THE RIGHT TO PRIVACY EMBRACES THE INDIVIDUAL'S PRIVATE CHOICE OF SEXUAL ACTIVITY AND ADULT PARTNER, THE STATE MUST SHOW THAT ITS FELONY STATUTE IS WELL-TAILORED AND BASED UPON A COMPELLING AND LEGITIMATE GOVERNMENTAL INTEREST.

"[R]egulations imposing a burden on [the right to privacy] may be justified only by a compelling state interest, and must be narrowly drawn to express only those interests." *Carey v. Population Services International,* 431 U.S. at 686; *Roe v. Wade,* 410 U.S. at 155 ("where certain fundamental rights are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest', . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake"). This Court, like the Eleventh Circuit, should hold Georgia to this well-established constitutional standard.

The state's attempt to interfere in the bedrooms of its citizens and to shape their private sexual choices "slic[es] deeply" into their fundamental right of intimate association. *See Moore,* 431 U.S. at 498. As in *Moore*, "[t]his is no mere incidental result of the ordinance." *Id.* When a person in Georgia privately engages in oral or anal intercourse with a consenting adult, male or female, married or unmarried, he or she faces a prison term of up to twenty years. O.C.G.A. § 16-6-2(a) (1984).[16]

16. Under the statute, the same acts committed forcibly could be punished with a shorter sentence. O.C.G.A. § 16-6-2(a).

The Eleventh Circuit appropriately insisted that the state "demonstrate a compelling interest in restricting" the rights at stake, and "show that the sodomy statute is a properly restrained method of safeguarding its interests." *Hardwick*, 760 F.2d at 1213.

The state's conclusory assertions or mere invocation of buzzwords such as "morality", "decency", or "health" are not sufficient to sustain an assault on protected freedom. Courts have a vital constitutional role to play in applying the appropriate standard before condoning the restriction of individual choice. Strict scrutiny, invoked whenever a fundamental right is trammeled, is particularly necessary to protect the rights of vulnerable individuals or minorities engaged in unpopular, though legitimate, activity.

Same-sex orientation is not itself illegal. *See Robinson v. California*, 370 U.S. 660 (1962). Nevertheless, gay men and lesbians face prejudice, stigma, discrimination, physical violence, and even criminal penalty because of whom they love and their choice to act upon that attraction. Not the least of their burdens is that courts often acquiesce in the deprivation of their equal rights, including their rights to sexual privacy and intimate association. Without clear guidance from this Court, courts and legislatures may continue to give only cursory review to constitutional claims by citizens who happen to be gay. *See, e.g., Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1202 (majority opinion circular and conclusory).[17]

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17. In *Doe*, the district court upheld a "sodomy" statute on the tautological theory that violations of it were illegal: "[I]f the state has the burden of proving that it has a legitimate interest in the subject of the statute or that the statute is rationally supportable, Virginia has completely fulfilled this obligation. Fundamentally, the state action is simply directed to the suppression of crime, whether committed in public or private." 403 F. Supp. at 1202. This Court must require courts to perform their constitutional tasks meaningfully; in the case of laws penalizing same-sex intimacy, this requires strict scrutiny.

The most striking recent example of a failure to apply strict scrutiny can be found by contrasting the well-reasoned and correct conclusion of the Eleventh Circuit with the cursory decision of the bitterly divided Fifth Circuit in its *en banc* opinion on the Texas "sodomy" statute. *Baker v. Wade*, 769 F.2d 289. The *Hardwick* court analyzed this Court's privacy cases without presumptively excluding gay men and lesbians from their scope. It demanded a real fulfillment of this Court's requirements for state intrusion.

By contrast, the Fifth Circuit offered no independent reasoning in rejecting a similar claim. The court merely asserted a "strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries," suggested without elaboration that it bore some relation to the implementation of "morality", and reversed the district court's findings and holding that the Texas statute is unconstitutional. *Baker*, 769 F.2d at 292.[18]

The Fifth Circuit's conclusory comment regarding social attitudes, and the state's use of a discriminatory misdemeanor statute to promote an undefined and undefended conception of "morality", contrast also with the approach of the *Baker* trial court. In a lengthy and learned opinion following an extensive trial, Judge Buchmeyer concluded that the state had presented no evidence at trial supporting any of its asserted interests, and, indeed, was unable to show even a rational relationship between those interests and the statute. 553 F. Supp. at 1142.[19]

The *Baker* trial court found that, "*under the record in this case, the defendants have nothing to rely* upon but the

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18. Reliance on asserted "tradition" would have kept contraception prohibited in *Griswold*, and segregation intact in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Constitution requires more.

19. The *Baker* district court opinion is notable both for the range of expert testimony it analyzes, and for its accurate and unbiased depiction of a frequently encountered experience of growing up gay in the United States. *See* 553 F. Supp. at 1121.

assertion of general platitudes (morality, decency, etc.)." *Id.* (original emphasis). For example, the only evidence offered in support of the "state's supposed interest in 'public health' [as] furthered by [the statute was] not based upon any independent research [and was] contrary to the medical and psychiatric literature, to the opinions of most American psychiatrists today, and to the very credible evidence given by plaintiff's experts." *Id.* Like all courts which truly required the state to defend an assault on same-sex relations, the district court found the state had not even seriously tried to meet its constitutional obligations.

Strict scrutiny is thus required to give meaningful protection to gay people's exercise of their equal privacy rights. A free nation cannot tolerate unsubstantiated reiteration of myth, insult, fear, and hate as the basis of public policy. *See Palmore v. Sidoti,* 104 S.Ct. at 1882 (prejudice and stereotypes cannot justify denial of protected right); *United States v. Moreno,* 413 U.S. 528, 534-35 (1973) (the "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); *O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975) ("mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty").[20]

One particularly important application of this constitutional principle is highlighted by the suggestion that the Georgia statute serves to promote "morality". (Brief at

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20. Courts have had to play this vigilant role before in regard to unpopular groups. *See, e.g., Bynum v. Schiro,* 219 F. Supp. 204, 209 (E.D. La. 1963), *aff'd,* 375 U.S. 395 (1964) (in support of restriction, city offers only offensive and irrelevant assertions of supposed health threat from black people); *Turner v. Randolph,* 195 F. Supp. 677, 679-80 (W.D. Tenn. 1961). Social prejudice stigmatized Irish immigrants and black people as carriers of disease. *See* Rosenberg, *The Cholera Years* 59-62, 181-83 (1962). That courts must be vigilant on behalf of homosexual people is evidenced by Georgia's willingness (Brief at 37 n.18) to rely on the testimony of Paul Cameron, who was expelled from the American Psychological Association and disclaimed by the American

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34-39). This Court need not resolve this question, for the state has not as yet been required to offer any evidence whatsoever that the statute serves such a function, that it is narrowly drawn, and that the "morality" supposedly furthered by the statute is in fact constitutional. However, this Court should affirm the Eleventh Circuit's insistence that the mere invocation of "traditional morality", without definition or application, cannot alone sustain such significant infringement on important, cherished, private activity.

This Court has repeatedly made clear that "[a] way of life that is odd or even erratic, but interferes with no rights or interests of others, is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972).

> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States.

Roe v. Wade, 410 U.S. at 157. As the New York Court of Appeals noted in *Onofre*:

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Sociological Association. *The Advocate*, Issue 432, Oct. 29, 1985, page 28. He has actually called for the extermination of gay people. CNN, "Crossfire", May 1985. The state's assertion of the same myths which seek to link homosexuality with child molestation, health threats, public lewdness, and so on (Brief at 36-37) is as offensive as they are baseless. *See, e.g.*, Gebhard, *Sex Offenders* (1965); Hoffman, *The Gay World* 89-92 (1968); Bell & Weinberg, *Homosexualities* 230; West, *Homosexuality* 119 (1968); Geiser, *Hidden Victims: The Sexual Abuse of Children* 75 (1979). Neither the district court in *Baker*, 553 F. Supp. at 1121, nor the New York Court of Appeals in *Onofre*, 51 N.Y.2d at 476, having reviewed the record and considered actual evidence, found that the state could show the similar statutes in question served any valid interest. The Eleventh Circuit rightly insisted that the state be obliged to prove its claims before invading the privacy of its citizens.

> The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

51 N.Y.2d at 488 n.3. That Court correctly observed that there is "a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have an effect on what is known as public morality." *Id.* at 489-90; *see also Commonwealth v. Bonadio*, 490 Pa. 91 (citing J.S. Mill and constitutional themes of state non-interference with individual private morality); Eur. Court H.R., Series B, No. 40, *Dudgeon Case*. The *Onofre* court found that the state had failed to demonstrate how statutes such as Georgia's "serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the [s]tate." 51 N.Y.2d at 489-90.

In the area of sexual privacy and the choice of a partner of the same sex, this Court should require that the lower courts act "to resolve the issue by constitutional measurement, free of emotion and of predilection," regardless of the "sensitive and emotional nature of the . . . controversy [and] the deep and seemingly absolute convictions that the subject inspires." *Roe v. Wade*, 410 U.S. at 116. The choices of how and with whom to enjoy sexual intimacy and intimate association are of paramount importance to all people. This Court should assure that all are given equal protection of this right to make those private decisions free of overbroad and unjustified government intrusion.

POINT III

STATUTES WHICH CRIMINALIZE PRIVATE CONSENSUAL SEXUAL ACTIVITY HAVE DAMAGING CONSEQUENCES BEYOND THE INVASION OF PRIVACY. SUCH LAWS PROVIDE A BASIS FOR FURTHER, UNJUSTIFIED DISCRIMINATION, INJURE THE PSYCHOLOGICAL WELL-BEING OF MILLIONS OF AMERICANS, AND UNDERMINE RESPECT FOR THE LAW AND LAW ENFORCEMENT.

Efforts to prohibit such common forms of private sexual expression as oral and anal sex, heterosexual as well as homosexual, are invasive and unwarranted. They are also largely unenforceable except in the most offensive and selective fashion.[21] *See, e.g., Baker*, 553 F. Supp. at 1130. The prevalence of such activity does not appear any less in the jurisdictions which forbid them than in those where they have been decriminalized.[22] Although they fail in their primary aim, in other ways, laws such as the Georgia statute wreak great harm on society and on millions of individuals.

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21. Not only are these statutes unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources, in fact, they are rarely enforced. *See, e.g.*, Note, *The Bedroom Should Not Be Within the Province of the Law*, 4 Cal. W.L. Rev. 115, 126 (1968). This suggests that the statutes do not play a major role in implementing whatever legitimate state interests may be asserted. By contrast, the mere existence of the statutes harms individuals and society in numerous unintended and impermissible ways.

22. Similarly, the incidence of homosexuality is no greater in Europe, where it is legal, than in the United States, where, until recently, a majority of states criminalized its expression. Weinberg & Williams, *Male Homosexuals: Their Problems and Adaptations* 83-89 (1974). Moreover, despite the state's unsupported insinuation, there is of course no indication that the decriminalization of private same-sex sexual activity has been accompanied by an increase in "sado-masochistic group orgies, or transvestism," public lewdness, rape, child molestation, or prostitution. (Brief at 36). Furthermore, the statute challenged here deals with private intimacy between adults; any public criminal acts can be and are dealt with by other statutes. The state's reliance on such discredited, offensive, irrelevant, and unsupported charges is one more indication why courts must perform their constitutional function of closely scrutinizing such statutes.

Society and the institutions of law enforcement are injured when the law embarks on a futile and intrusive invasion of citizens' privacy. As one judge has observed:

> I recall sitting as a trial judge . . . and hearing police officers testify how they stood on a box to peer through a bedroom window in a private home to observe two adult males engage in voluntary sex acts. The males appeared to be intelligent, sensitive gentlemen, accepted by the community socially and economically. Yet they were subjected to a felony charge for no evident societal purpose. They were convicted, and I gave them probation. I have often wondered how they survived the humiliating exposure of a felony trial and conviction for their private behavior. And I wondered, too, if these two law enforcement officers could not have more effectively employed their time to serve the community by pursuing thieves and robbers.

Mosk, *The Consenting Adult Homosexual and the Law (Foreward)*, 13 U.C.L.A.L. Rev. 643, 645 (1966). This police intrusion is as offensive as that condemned in *Griswold*,[23] and is the reason why there is increasing acceptance for the view that private sexual activity is just "not the law's business." Report of the Committee on Homosexual Offenses and Prostitution (Wolfenden Report) 24 (1957).

The state's attempt to enforce such statutes degrades both the state and those on whose privacy they intrude. Moreover, the inevitable widespread flouting of such laws breeds contempt for the legal order. Where people feel the state has no lawful business, they will not surrender their most private, most fundamental freedoms. Criminal sanctions will not deter people from having private consensual intercourse with the partner of their choice "because 'sex, next to hunger and thirst is the most powerful drive that human beings experience,' and it is unrealistic to think that

23. In *Griswold*, this Court demanded:
> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy.

381 U.S. at 485-86.

such laws will force total abstinence." *Baker*, 553 F. Supp. at 1130. Historically, such prohibitions have failed and continue to fail, but not without great cost to millions.

By setting gay people apart and proscribing sexual activity in which they engage, these statutes do them great harm. Just as society is rendered less stable when it outlaws such a permanent and often influential subculture, so the individuals involved face numerous hardships and consequences far beyond the criminal proceeding.

Because gay men and lesbians have few legal protections from discrimination based on their sexual orientation,[24] conviction, and even the mere arrest, for same-sex sexual activity can lead to discrimination in employment, housing, and the like.[25] Even where there has been no violation, the mere existence of such laws has been cited as a basis for infringing First Amendment and other rights of gay men and lesbians. *See, e.g., National Gay Task Force v. Bd. of Education*, 729 F.2d 1270 (10th Cir. 1984), *aff'd mem.*, — U.S. —, 105 S.Ct. 1858 (1985) (state seeks to justify statute limiting right to speak about homosexuality by mere existence of law penalizing same-sex sexual activity).[26] Parents have even been denied custody of their children by courts which find no real harm to the children, but condemn the parents' same-sex relationships and refer to

24. Only one state, Wisconsin, and some forty-nine local jurisdictions explicitly protect the equal civil rights of gay citizens and prohibit discrimination based on sexual orientation or affectional preference.

25. *See* Rivera, *Queer Law: Sexual Orientation in the Mid-Eighties*, Part I, 10 Dayton L. Rev. 459 (1985); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (1979); Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L. Rev. 311 (1980-81).

26. *See also Gay Activists Alliance v. Bd. of Regents*, 638 P.2d 1116, 1121-22 (Ok. 1981) (lower court upheld refusal by regents to grant organization recognition because of mere existence of

(continued on following page)

state statutes prohibiting such sexual activity. *See, e.g., Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).[27]

Indeed, although mere status as a "homosexual" is not criminal, some courts have seized upon criminal laws regarding sexual activity to conclude that having same-sex orientation is to engage in, or at least contemplate, prohibited conduct. *See, e.g., In re N.R.S.*, 403 So. 2d 1315, 1318 (Fla. 1981) (Boyd, J., dissenting) ("Even without evidence of actual conduct, I am opposed to the admission [to the bar] of any person whose admitted 'orientation' indicates a lifestyle likely to involve routine violation of a criminal statute."); *Gay Activists v. Lomenzo*, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971), *rev'd*, 329 N.Y.S.2d 181 (3d Dep't 1972), *aff'd*, 31 N.Y.2d 965 (1973). Similarly, people mistakenly believe that criminal laws such as Georgia's make it illegal to be gay. E.g., Boggan, Haft, Lister, Rupp & Stoddard, *The Rights of Gay People* (1983).

Such stigmatization, both unfair and improper, exacts a great cost from many gay men and lesbians. Frequently treated as deviants and outcasts, they are often forced to develop the coping mechanisms common to most persecuted groups, including ethnic, racial, and religious minor-

(continued from previous page)

Oklahoma law against homosexual activity); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 850 (8th Cir. 1977), *cert. denied sub nom. Ratchford v. Gay Lib*, 434 U.S. 981 (1978) (reversing district court which "ruled that the school officials justified their refusal on the ground that recognition . . . would probably result in the commission of felonious acts of sodomy"); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) (existence of penal sanctions given as a "special" reason why advertisement for gay counseling and legal aid not protected by First Amendment); *Gay Students Organization v. Bonner*, 509 F. 2d 652, 662-63 (1st Cir. 1974) (ban on gay social functions invalid despite university's asserted interest in "preventing illegal activity, which may include 'deviate' sex acts [or] 'lascivious carriage' "); *see also Lexington Theological Seminary v. Vance*, 596 S.W.2d 11 (Ky. 1979).

27. *See*, e.g., discussion of other cases of discrimination in Rivera articles listed in footnote 25.

ities. These traits vary with the individual, and can include strong identification with the minority group, independence, and bonding, or, on the other hand, feelings of insecurity, denial of membership in the group, self-hatred, and alienation. Allport, *The Nature of Prejudice* (1954); *see also* Coleman, "Changing Approaches to the Treatment of Homosexuality: A Review," *Homosexuality* 81.

Characterization of an individual as deviant causes others to construe all his or her behavior as manifesting deviance. Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, 25 Am. Behav. Scientist 483, 485 (1982). Because same-sex sexual activity is labeled "deviant" and prohibited, gay people become stigmatized and are saddled with self-perpetuating, undesirable stereotypes. *Id.* This, in turn, fosters discrimination and thus greater stress, instability, and hardship for the individuals concerned, without even any link to the supposed state interests at stake.

For gay people, sexuality and their sexual orientation play an especially central role in the definition of self, in the identification with others, and in the acceptance of being different from the majoritarian model. Tripp, *The Homosexual Matrix*. It is an aspect of their personality with which they must learn to come to terms in order to get on with their lives. Because of widespread social hostility and ignorance, many face this issue alone, in fear, and even in shame. "The decision to 'come out of the closet' and avow one's homosexual association is certainly a statement of great personal importance and may also be a political act." Karst, 89 Yale L.J. at 654. Laws such as Georgia's

thus impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment.[28]

The Georgia statute denies gay people any opportunity to enter into the intimate one-on-one relationships which nearly all people cherish as at the heart of life's meaning and richness. Gay people are already denied the opportunity to marry and thus "to enter the only relationship in which the State . . . allows sexual relations legally to take place."[29] *See Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *see also* Karlen, *Sexuality and Homosexuality* 408. Just as non-gay people are assured of strict scrutiny by the courts to protect their right of access to this intimate association, so gay people must be protected against a total barrier to sexual intimacy with a partner of their choosing.

Like all human beings, gay men and lesbians seek and need the solace and enjoyment of intimate association with another. This Court should recognize their constitutional right to privacy in such intimate endeavors, and should draw the line at unjustified and offensive governmental intrusion into the bedrooms and private lives of Americans who seek as people to love and as citizens to be let alone.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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28. The fact that state regulation of same-sex behavior constitutes the total prohibition of an entire way of life distinguishes it from the regulation of public opportunities to view obscenity, a less fundamental interest of the individual. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973). Of course, even viewing obscenity is protected when done in private. *Stanley*, 394 U.S. at 557.

29. The Georgia statute also denies sexual privacy even to married, non-gay couples. For that reason as well, the court below correctly required the state to demonstrate the compelling interest for its sweeping invasion into private lives.

Respectfully submitted,

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No. 85-140

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner

V.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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No. 85-40, October Term, 1985.

QUESTION PRESENTED

Whether the State of Georgia must demonstrate a compelling state interest in the face of a constitutional challenge to a criminal sodomy statute?

CONSENT OF THE PARTIES

The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Jewish Congress, which was founded in 1918, is a membership organization of American Jews dedicated to the protection of the civil liberties of all Jews and of all Americans. Among their many activities directed to these ends, the American Jewish Congress has in the past filed amicus curiae briefs in most of the significant cases where there is a serious challenge on Constitutional grounds of government interference with the fundamental rights guaranteed citizens by the Bill of Rights.

In addition to many other concerns, the American Jewish Congress opposes legislation that interferes with the liberty of an individual to exercise his or her own conscience in the conduct of his or

her personal life, free of unwarranted government intrusion. States should not interfere with the right of an individual to determine the course of his or her life, with the burden on the government to demonstrate its overriding compelling needs. Moreover, American Jewish Congress is on record opposing discrimination against homosexuals in housing, employment, and other areas.

Jewish law unambiguously forbids homosexual acts. The Amicus, a Jewish organization, is not filing this brief because it believes that homosexuality is, from a Jewish religious perspective, acceptable sexual preference. However, American Jewish Congress believes that before government may regulate intimate sexual association occurring in the privacy of the home, it must demonstrate a compelling justification

of public needs, not merely a demonstration by the legislature of the moral beliefs of a majority of the voters.

This present case involves a law of the State of Georgia regulating sexual behavior between consenting persons, irrespective of their marital status, whether they are heterosexual or homosexual, irrespective of their minor or majority status, and irrespective of the location of the prohibited sexual activity. It is a sweeping law which is overly broad on its face, allowing -- as in the application of the present case -- the intrusion of state authorities into a private citizen's bedroom to assess the nature of the sexual activites within. The risks of unbridled governmental power in the private lives of our citizens is a serious challenge to basic freedoms of privacy. Amicus believes that such governmental intrusion into the

"private realm" requires the state to demonstrate "a compelling state interest."

In addition, the state's brief suggests that the sweeping range of the statute is acceptable because of its key purpose in regulating principally homosexual practices, practices which the state maintains are abhorrant to historic and contemporary religious codes of morality. Unequal application of the statute does not make it constitutionally more acceptable, and the potential use of a criminal statute for harrassment of individuals due to their sexual preference has been a concern to the American Jewish Congress.

STATEMENT OF THE CASE

Michael Hardwick was arrested in his home on August 3, 1982, and charged by the Atlanta police under Georgia statute 16-6-2 (1984) for committing a prohibited sexual act with a consenting adult in his bedroom. The Georgia Sodomy Act criminalizes any sexual act involving the sex organs of one person and the mouth or anus of another. The penalty for the offense applies to all persons, whether single or married, heterosexual or homosexual. The prohibited sexual acts are punishable by one to twenty years of prison. The District Attorney has not requested an indictment from the Grand Jury, but has also not dismissed the case. Under the statute of limitations, the District Attorney may take the case to the Grand Jury at any time up to four years.

Hardwick sued the State of Georgia, the District Attorney, and the Attorney General in the U.S. District Court for the Northern District of Georgia, challenging the statute on its face.

John and Mary Doe, a married heterosexual couple, who feared prosecution under the same statute, filed a complaint in the Federal District Court seeking a declaratory judgment that O.C.G.A. 16-6-2 (1984) applied to private sexual conduct between consenting adults was unconstitutional.

The District Court ruled that Hardwick had standing to sue, but that the Does did not have standing. The District Court dismissed Hardwick's complaint on the grounds that his constitutional claims had been rejected by the Supreme Court in Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 90 (1976), aff'g 403

F.Supp. 1199 (E.D.Va 1975).

Hardwick appealed to the U.S. Court of Appeals, Eleventh Circuit. That Court found that Hardwick did have sufficient standing to sue, while the Does did not; that the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney, supra, was not binding precedent; and that the Georgia sodomy statute infringed upon fundamental constitutional rights of the plaintiff. The Court of Appeals ruled that the constitution prevents states from unduly interfering in certain individual decisions critical to personal autonomy because the decisions are essentially private. The Court of Appeals ordered the case remanded, and ruled that, in order for Georgia to enforce the statute, Georgia must demonstrate a compelling interest in restricting those rights, and must also demonstrate that the statute was a properly

restrained method of safeguarding its interests.

The State of Georgia filed a writ of Certiorari to the Supreme Court and the writ was granted November 4, 1985.

ARGUMENT

INTRODUCTION

In the decision below, the United States Court of Appeals for the Eleventh Circuit determined that the Georgia criminal sodomy statute, O.C.G.A. 16-6-2, infringed upon fundamental rights. The Court of Appeals remanded the case to the district court to determine whether the State of Georgia had a compelling justification for the statute. Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir. 1985). Because the Georgia statute as enforced intrudes broadly on the right of privacy traditionally attached to the home and on the right of private intimate association, the decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

The question before the Court is not the validity of the Georgia statute, but rather

whether the statute should be subject to heightened judicial scrutiny. There will be ample opportunity before the trial court on remand for the State of Georgia to show that its statute has specific compelling justifications, if indeed it does.

The Court of Appeals' conclusion that the statute should be subject to heightened scrutiny was warranted by the sweeping scope of the statute and by the broad way in which the statute could be enforced. The statute is not aimed merely at protecting minors, or at preventing sexual acts that were not consented to, nor is it aimed merely at regulating sexuality in public bathhouses and bars, or at the public promotion of a particular kind of lifestyle. The statute is much broader, reaching actions which occur in private bedrooms between consenting adults, and reaching a person's intimate association

with another. Amicus believes that the Constitution and this Court's decisions require the State of Georgia to offer special justifications if it is to regulate even quintessentially private matters that occur in quintessentially private places.

I. THE COURT BELOW CORRECTLY CONCLUDED THAT STATE ACTION INTRUDING ON MATTERS OF SEXUAL INTIMACY IS SUBJECT TO HEIGHTENED JUDICIAL SCRUTINY UNDER THE FOURTEENTH AMENDMENT.

The principles underlying the Constitution's guarantees of privacy were summarized by Mr. J. Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478.

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a

> part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

The Supreme Court has clearly recognized a realm of "private belief and action which is free from unwarranted state intrusion." The Court has held that citizens shall retain the liberty -- that has come to be know as the "right of privacy" -- to conduct their personal lives with dignity and without unwarranted State interference. The States may not infringe upon personal liberty unless the State demonstrates that, in so doing, the state narrowly serves "a subordinating interest which is compelling". Bates v. City of Little Rock, 361 U.S. 516, 524; Griswold v. Connecticut, 381 U.S. 479, 485 .

A. STRICT SCRUTINY APPLIES TO GOVERNMENT INTRUSION INTO AREAS OF SEXUAL INTIMACY.

Several decisions of the Supreme Court make clear that decisions pertaining to marriage, family life, and sexual intimacy are protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 12; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, Meyer v. Nebraska, 262 U.S. 390, Prince v. Massachusetts, 321 U.S. 158, 166; Skinner v. Oklahoma, 316 U.S. 535, 541, Roe v. Wade, 410 U.S. 113.

In Griswold v. Connecticut, supra , seven Justices of the Court agreed, albeit on varying constitutional grounds, that a law forbidding the use of contraceptives as a birth control measure was an unwarranted interference with individual liberty because it prevented married and unmarried

individuals from determining for themselves the personal question whether or not or when to have children.

The opinion of the Court in Griswold, 381 U.S. at 479-486 , traced the development of the constitutional concept of the sanctity of the individual and determined that the right of privacy is derived from the "penumbras" of the "specific guarantees in the Bill of Rights...formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. The concurring opinions in Griswold stressed that the Ninth and Fourteenth Amendments to the Constitution contemplate a reservoir of unspecified personal rights now encompassed in the term "right of privacy" that the people had not delegated, and should never

be compelled to delegate, to a state or the federal government.*

An anti-miscegenation statute was held unconstitutional in Loving v. Virginia, 388 U.S. 1, 12, (1967) because the state deprived the defendants of the freedom to marry or not marry a person of another race.

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* Publius , author of The Federalist, observed that the Constitution as originally drafted, before the adoption of the first ten Amendments, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist, No. 8 (Hamilton) at 561 Mod. Lib. Ed., 1933 (capitals in the original). "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations... 'WE THE PEOPLE of the United States, to secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of ...aphorisms...which would sound much better in a treatise of ethics than in a constitution of government.

"But a minute detail of particular rights is certainly far less applicable to

In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court recognized the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child. The Supreme Court's decisions in Carey v. Population Services International, 431 U.S.678 (1977) and Eisenstadt v. Baird, supra, make it clear that there is a right of sexual privacy which must be free from unwarranted government intrusion. In Roe v. Wade, the Court recognized the right of women to determine whether or not to have an abortion. 410 U.S. 113 (1973).

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to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." Ibid at pp. 558-559 (Emphasis in the original).)

Well entrenched within our legal history, codified in our Constitution, and affirmed in the Supreme Court's decisions is the proposition that the Government must show special deference and must have compelling justifications when it chooses to intrude into the most private realms of its citizens' lives.

B. STRICT SCRUTINY APPLIES TO GOVERNMENT INTRUSION IN THE HOME.

The Supreme Court's past decisions reflect the fact that rights of sexual expression and sexual intimacy depend to a unique degree upon where the activities in question occur. For example, the Court has held that the legitimacy of regulating the viewing of sexual materials depends on the location of such viewing. See Paris Adult Theatre I v. Slaton ,413 U.S. 49,65-67

(1973); Stanley v. Georgia, 394 U.S. 557, 564-68 (1969). Similarly, it is clear that, while the state may not forbid the sexual relations of a married couple in the privacy of their home, it may forbid the same couple from being "locked in a sexual embrace at high noon in Times Square." Paris Adult Theatre I. supra at 67. In another case dealing with sexual materials, the Court noted: "The Constitution extends special safeguards to the privacy of the home...It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public. United States v. Orito , 413 U.S. 139, 142-43 (1973).

A citizen has a right to protection in an area where there is a reasonable expectation of privacy. Katz v. U.S. 398 U.S.347 (1967). There is no more

reasonable place than the home.

"[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, 445 U.S. 573, 601 (1980) (footnote omitted). As recently as last Term, this Court reaffirmed "that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required..." Winston v. Lee , ___U.S.___. 105 S.Ct. 1611, 1620 (1985).

This case does not require the Court to determine the "outer limits" of the realm of personal freedom and autonomy guaranteed by the Constitution. This case threatens the very heart of the domain of privacy.

II. A LEGISLATIVE PURPOSE OF PROHIBITING HOMOSEXUAL SODOMY CANNOT JUSTIFY A FAILURE TO APPLY STRICT SCRUTINY TO THE STATUTE.

A. STRICT SCRUTINY IS NECESSARY BECAUSE THE STATUTE PROHIBITS CONDUCT OTHER THAN HOMOSEXUAL SODOMY.

This statute makes criminal a broad range of sexual activity and provides for such activity a penalty of one to twenty years in jail.

Even if homosexual sodomy was a crime which could be prohibited in a statute which could escape strict scrutiny, this statute goes well beyond the prohibition of only homosexual sodomy and on that basis, must be subject to strict scrutiny.

B. STRICT SCRUTINY APPLIES EVEN IF THE STATUTE WAS APPLICABLE ONLY TO HOMOSEXUAL SODOMY.

In effect, the State of Georgia -- in its justification for this sweeping statute on the grounds of alledged uniform

disapproval of homosexuality -- has conceded that it intends to enforce this statute selectively.

At a minimum, heightened judicial scrutiny means that Georgia cannot justify this regulation simply by asserting that certain kinds of consensual adult sexual practices are so clearly and self-evidently evil that no further justification is required. The trend towards decriminalization of consensual adult sexual practices makes any such claim untenable. As the State of Georgia concedes, "22 states have legislatively decriminalized homosexual sodomy." Petitioner's Brief at 23.

These changes in legal thinking among the state legislatures have occurred largely since the time, over twenty years ago, when admittedly, some Justices seemed to take for granted the government's

authority to outlaw certain homosexual acts. See Poe v. Ullman , 367 U.S. 497, 553 (1961) (Harlan, J., dissenting); Griswold v. Connecticut , 381 U.S. 479, 499 (1965) (Goldberg, J., concurring). That a particular attitude towards a particular activity has had a long history of general acceptance has never before meant that this Court was bound to defer to that attitude in the face of evolving standards and norms. Cf . Loving v. Virginia , 388 U.S. 1 (1967); Brown v. Board of Education , 347 U.S. 483 (1954). Last Term, the Supreme Court adopted a similar structure of analysis once again in its discussion of the use of deadly force to apprehend fleeing felons. The Court noted that there had been a "long-term movement... away from the rule that deadly force may be used against any fleeing felon..." Tennessee v. Garner , ___U.S.___. 105 S. Ct. 1694, 1705 (1985).

The issues before the Court in the case at bar do not require a finding that Georgia cannot constitutionally legislate a criminal prohibition of homosexual sodomy. This issue will undoubtedly be raised in the proceedings which will follow. However, the trend among the states does make it impossible for the State of Georgia to maintain plausibly that the acts it would outlaw, even in private and among consenting adults, are so transparently evil as to make a demand for further justification pointless, or otherwise inappropriate.

CONCLUSION

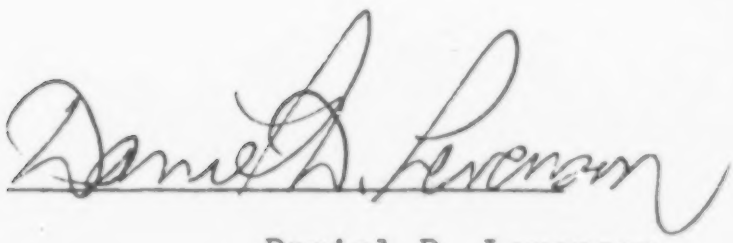
There is a public domain where the community must wrestle with questions of public morality. But there is a private sphere where the costs to our individual freedom from state intrusion can only be allowed for the most compelling of state interests, if at all. Although not an issue before the Court at this time, it is unlikely that Georgia will be able to demonstrate such a compelling interest in the regulation of private sexuality between consenting adults in private homes, even if such sexuality is homosexual sodomy.

In Roe v. Wade, supra Mr. Justice Blackmun reminded the Court of the admonition of Mr. Justice Holmes "now-vindicated dissent in Lochner v. New York, 198 U.S. 45, 76 (1905):

> (The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the quesion whether statutes emboying them conflict with the Constitution of the United States.

For the above stated reasons, the judgment below should be affirmed.

Respectfully submitted,



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No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL GAY RIGHTS ADVOCATES, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, LOS ANGELES LAWYERS FOR HUMAN RIGHTS AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a State exceeds its inherent police power when it attempts to induce conformity to a particular moral view through the imposition of substantial criminal penalties upon intimate conduct between consenting adults which takes place in the seclusion of the home.

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BRIEF OF NATIONAL GAY RIGHTS ADVOCATES, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, LOS ANGELES LAWYERS FOR HUMAN RIGHTS AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, Los Angeles Lawyers for Human Rights and California Lawyers for Individual Freedom file this brief *amici curiae* with the consent of the parties.

———o———

INTEREST OF THE AMICI CURIAE

National Gay Rights Advocates is a nonprofit, public interest law firm involved in litigation throughout the country to advance the civil rights of lesbians and gay men. This litigation has addressed major constitutional issues as well as procedural matters and issues of state law, including housing and employment discrimination, immigration and naturalization policies, challenges to laws which proscribe private sexual conduct of consenting adults and the rights of gay people to serve in the military.

Bay Area Lawyers For Individual Freedom (BALIF) is an organization of more than 400 gay and lesbian lawyers and legal workers that works to increase the input and representation of lesbians and gay men in the judiciary, local and state Bar organizations and other policy making bodies. BALIF also encourages and supports the appointment of lesbian and gay attorneys to the judiciary, public agencies and commissions; takes action on questions of law and the administration of justice as they affect the les-

bian and gay community, including the filing of *amicus curiae* briefs; endorses candidates for office; takes positions on ballot propositions; evaluates the qualifications of candidates seeking judicial appointment; analyzes and proposes legislation; gives testimony on bills dealing with gay issues; and presents educational programs.

Los Angeles Lawyers for Human Rights (LHR) is an affiliate of the Los Angeles County Bar Association. LHR was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. LHR is made up of judges, attorneys, and law students from diverse backgrounds. LHR participated as *amicus curiae* in *New York v. Uplinger*, 104 S.Ct. 2332 (1984) and *Board of Education v. National Gay Task Force*, 105 S.Ct. 1858 (1985). Like BALIF, as an organization of attorneys, LHR recognizes and is concerned about the overall discriminatory effect of laws which criminalize the private affectional behavior and intimate association of adults, especially in such areas as employment, housing, parenting, and delivery of governmental services.

California Lawyers for Individual Freedom (CALIF) is a statewide organization of over 650 lawyers concerned with securing equal civil rights for gay men and lesbians. CALIF promotes representation of gay men and women within State Bar committees and delegations, and takes action on issues of law as they affect the rights of lesbians and gay men, including the filing of *amicus curiae* briefs.

———o———

STATUTORY PROVISION INVOLVED

The statute in question is Georgia Code section 16-6-2 (1981), which provides as follows:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.
>
> * * * * *
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.
>
> * * * * *

A second portion of the statute, not at issue in this case, criminalizes forcible sodomy. The statute at issue applies to all persons, married or single, heterosexual or homosexual.

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SUMMARY OF ARGUMENT

The issue before the Court in this case is far more significant and complex than its phrasing by the State of Georgia would indicate. Properly phrased, the question is whether the State, using moral indignation as its justification, may intrude into personal relationships and invade people's homes to criminalize private consensual adult sexual conduct. *Amici* contend that where the sole objective of a statute is the regulation of private morality, the State's police power may not be employed to invade the privacy of protected spaces such as the home, absent

a strong showing of harm. The Georgia statute in question is an improper exercise of the police power because it imposes criminal sanctions in order to enforce conformity to a single moral view, and in the process invades important personal rights. The traditional disapproval of homosexuality, proffered by the State as a rationale for this statute, is an impermissible goal in a pluralistic, secular society and does not justify the extreme intrusions on protected interests which the Georgia statute permits. It is simply inconsistent with "the concept of ordered liberty" and with contemporary understanding of what constitutes a civilized society to permit the State to express disapproval by allowing the entry of police into the privacy of one's bedroom to make an arrest for harmless noncommercial sexual conduct between consenting adults.

ARGUMENT

I. THE STATE HAS FAILED TO SHOW SUFFICIENT JUSTIFICATION FOR THIS EXERCISE OF THE POLICE POWER WHICH INTRUDES INTO THE PRIVACY OF THE HOME TO REGULATE INTIMATE CONDUCT BETWEEN CONSENTING ADULTS.

The Georgia statute is an exercise of the State's police power, the power of the State to regulate in the public interest. The police power "connotes the time-tested conceptional limit of public encroachment upon private interests."[1] *Goldblatt v. Town of Hempstead*, 369 U.

[1] The "private interest" implicated when the State exercises its police power is the interest of the individual in liberty. The

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S. 590, 594 (1962). To determine if a regulation is a valid exercise of the police power, the Court is guided by the following rule:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Id. at 594-95 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

In evaluating whether a challenged exercise of the police power is "not unduly oppressive upon individuals," the Court's inquiry properly focuses on the nature of the individual interest which is burdened and the extent of the burden, the rationality of the connection between the legislative purpose and the means chosen to achieve that purpose, the legitimacy of the legislative purpose and the existence of alternative means to effectuate the legitimate governmental purpose. *Zablocki v. Redhail*, 434 U.S. 374, 396 (1978) (Stewart. J., concurring). *See also Moore v. City of East Cleveland*, 431 U.S. 374 (1978). The nature and magnitude of the individual interest involved largely determines the degree to which both the legislative purpose and the means chosen to promote it are subjected to

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(Continued from previous page)

Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." The Due Process Clause affords not only a procedural guarantee against the deprivation of liberty, but also protects substantive aspects of liberty against unconstitutional restrictions by the State. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

judicial scrutiny. *See City of Cleburne v. Cleburne Living Center*, — U.S. —, 105 S.Ct. 3249, 3260-3261 (1985) (Stevens, J., concurring).

In the present case, two important individual interests are implicated: the interest in engaging in intimate conduct of one's own choosing and the interest in "residential privacy" or the maintenance of the home as "a sanctuary privileged against prying eyes . . . where most intimate associations are centered." Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 634 (1980). The individual's interest in engaging in truly private consensual sexual conduct, that is, sexual conduct in the seclusion of the home or a similar private space, is arguably "fundamental" within the meaning of this Court's prior decisions, as respondents and several other *amici* will argue. Even if not deemed "fundamental," however, these are undeniably important interests whose role in the life of individuals is significant, if not central. The Court has found that these interests are entitled to a significant degree of protection from governmental intrusion. *See, e.g., Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244, 3249-3250 (1984); *Payton v. New York*, 445 U.S. 573, 589-590 (1980).

Previous decisions of this Court have derived from the "concept of personal liberty and restrictions upon state action" contained in the Fourteenth Amendment, a right of privacy which functions as a substantive limit on the police power of the State to control certain kinds of conduct. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), this Court identified personal rights which may be deemed "fundamental" or "implicit in the concept of ordered liberty."

Id. at 65 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court noted that these include "*the personal intimacies of the home*, the family, marriage, motherhood, procreation, and child rearing." *Id.* (emphasis added).

The principle that the State must respect the home as a place of sanctuary is one of the most cherished in our system of law and one that is firmly grounded in the Constitution. As the Court stated in *Payton v. New York*, 445 U.S. 573 (1980),

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Id. at 589-90 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

The interest of the individual in the sanctuary of his home predominates even when the State seeks to regulate conduct not protected by a "fundamental" privacy right. Thus, the Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), found that possession of obscene matter in the home was protected, even though such material was properly subject to regulation in the public arena. The Court stated:

> Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the

> right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

Id. at 564.

Thus the home itself, both because of the individual's need for a place of sanctuary and because it is the locus of intimate associations, has long been considered deserving of special constitutional protection. *Stanley v. Georgia*, 394 U.S. 557 (1969); *see also*, Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 634 (1980); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 Cornell L.Rev. 563, 588-89 (1977); Seigel, *Privacy: Control Over Stimulus Input, Stimulus Output and Self-Regarding Conduct*, 33 Buffalo L.Rev. 35 (1984); Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 Calif. L.Rev. 1447 (1976); Note, *Roe & Paris: Does Privacy Have a Principle?* 26 Stan.L.Rev. 1161, 1185-89 (1974).

The Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973), found the State's interests in controlling the public, commercial exploitation of sexuality and in establishing a "moral tone" for downtown areas sufficient to justify prohibiting the viewing of obscene material in a theatre. When the materials are viewed in the confines of one's home, however, the individual's interests in maintaining the home as a sanctuary for self-expression and as a situs for intimate relationships increase substantially, while the State's interests are considerably, if not entirely, diminished. When the Court in *Paris Adult Theatre I* rejected the notion that consenting adults had a right to watch obscene films in a public theatre, it reiterated that although such conduct was not protected by a fundamental

privacy right it was nevertheless beyond the reach of the criminal law when it took place in the home. *Id.* at 66 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

The choice to form and maintain intimate human relationships is also a fundamental element of the personal liberty guaranteed by our constitutional system, and one which is protected from unwarranted interference by the State. *Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244, 3249 (1984). The Court stated:

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 3250.

The protection from unjustified government intrusion is not limited to marriage and "traditional" family relationships. As the Court in *Roberts* recognized, between the poles of family relationships and business associations,

> lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Id. at 3251.

An objective evaluation of homosexual relationships will locate them on the spectrum of human interactions

closer to intimate family relationships than to impersonal business associations. Accordingly, there must be a higher degree of justification for State interference with a homosexual relationship than with a business arrangement.

Consistent with this Court's recent opinions, *amici* contend that the State must make a stronger showing to justify legislation which has as its only purpose the control of morality, especially when that legislation reaches into the confines of the home and touches intimate relationships. The State has broader latitude to regulate conduct in public places or conduct which more directly impinges on public sensibilities.[2] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447-449 (1972). However, the protection given to conduct in the home applies even where the prohibited conduct is not subject to the kind of per se privacy protection as are decisions regarding marriage and childbearing, and even where the majority disapproves of the conduct. *Stanley v. Georgia*, 394 U.S. 557 (1969).

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[2] For example, the State has a legitimate interest in regulating sexual conduct which takes place in public. As this Court has observed, the high degree of constitutional protection given to the marital relationship does not protect "marital intercourse on a street corner" or "at high noon in Times Square." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13, 67 (1973).

II. NEITHER THE DESIRE FOR MORAL CONFORMITY NOR THE TRADITIONAL DISAPPROVAL OF HOMOSEXUALITY ARE SUFFICIENT TO JUSTIFY THE GEORGIA STATUTE AS A PROPER EXERCISE OF THE POLICE POWER.

A. The Regulation Of Private Morality Does Not Justify Georgia's Intrusion Into Intimate Relationships And The Home.

Petitioner concedes that the aim of the Georgia statute is to promote traditional morality. Petitioner's Brief at 34-36. However, the promotion of traditional notions of morality does not justify imposing criminal sanctions upon private consensual adult sexual behavior.

The State, of course, may regulate sexual activity when such regulation promotes a legitimate state interest. For example, Georgia has a proper role in proscribing forcible sexual acts, in protecting minors from being sexually used by adults, in preventing public displays of sexual behavior, and in regulating the commercialization of sexual activity. To promote these valid state interests, Georgia has a broad range of criminal statutes proscribing rape, Georgia Code section 16-6-1 (1981); forcible sodomy, *id.*, section 16-6-2; statutory rape, *id.*, section 16-6-3; child molestation, *id.*, section 16-6-4; public indecency, *id.*, section 16-6-8; prostitution, *id.*, section 16-6-9; pimping, *id.*, section 16-6-11; and pandering, *id.*, section 16-6-12. Obviously, with these prohibitions in place, the Georgia statute in question has only one possible purpose—regulation of the private sexual behavior of adults.

The sexual acts proscribed by the statute at issue are subject to criminal penalties even when they take place in

total seclusion. The sole purpose for reaching such private conduct, and Petitioner's admitted rationale, is the expression of the collective moral disapproval of the enumerated acts by the General Assembly of Georgia. Petitioner's Brief at 31. This, however, is an impermissible purpose.

The protection of the public morality may, in some instances, be a legitimate State purpose. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 69 (1973). However, private adult consensual sexual activity takes place without public scrutiny and without intruding upon the sensibilities of the general public. There is no element of force, commercialization, or exploitation of minors. In addition, nobody, including the participants, suffers any harm which justifies state intrusion.[3] In this instance, the interests of individuals in the sanctuary of their homes and in maintaining intimate relationships outweighs the interest of the State in regulating morality. Quite simply, " [n]o harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." Model Penal Code § 107.5—Sodomy and Related Offenses. Comment (Tent. Draft No. 4, 1955).

In the absence of any intrusion on the sensibilities of the general public, or any component of force, coercion,

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[3] For example, statutes which regulate private conduct by prohibiting drug use or requiring motorcyclists to wear protective helmets, have been upheld, in part, on the ground that the State has an interest in preventing its citizens from harming themselves. *See, e.g. State v. Baker,* 56 Hawaii 271, 535 P.2d 1394 (1975) (use of marijuana); *State v. Lombardi,* 104 R.I. 28, 241 A.2d 625 (1968) (helmets). However, in the case of sodomy, even this element of self-inflicted harm is absent.

exploitation of the young or commercialization, the sole statutory purposes to be served are the prevention of moral indignation, outrage or disgust with which one segment of society regards another, and the enforced conformity of private sexual conduct to state-prescribed norms. Whatever the validity in other societies of the use of the criminal law to enforce majority views regarding private morals,[4] such use is singularly inappropriate in a secular, pluralistic society such as ours which was founded upon a tradition of nonconformity and which has institutionalized a number of guarantees in the Bill of Rights and Civil War Amendments to protect minorities from the democratically expressed will of the majority.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

The notion of required conformity to official views on matters so personal is antithetical to the basic political traditions of our society. *Id.* at 639-642. This deeply rooted respect and protection for minority rights in personal matters has proved sufficient to overcome the dis-

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[4] *See*, e.g., the debate between H.L.A. Hart and Lord Patrick Devlin on the criminalization of private sexual conduct. H.L.A. Hart, *Law, Liberty and Morality* (1963); P. Devlin, *The Enforcement of Morals* (1965); Levi, *The Collective Morality of a Maturing Society*, 30 Wash. & Lee L.Rev. 399 (1973); Note, *Roe and Paris: Does Privacy Have a Principle?* 26 Stan. L.Rev. 1161, 1167-1171 (1974).

approval of a substantial part of the citizenry towards interracial marriage, contraception and abortion. *Loving v. Virginia,* 388 U.S. 1 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Roe v. Wade,* 410 U.S. 113 (1973).

Anti-sodomy laws, as Petitioner points out, are rooted in religious teachings. Petitioner's Brief at 20-21. However, the quest for moral conformity or the extirpation of sin are inconsistent with the function of a government of limited powers in a secular society. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 Colum. L. Rev. 391 (1963). Even assuming the Georgia statute represents the majority's moral views, there are more appropriate methods for inculcating moral values than the criminal law:[5]

> Immorality clearly should not be viewed as a sufficient or even a principal reason for proscribing conduct as criminal. Morals belong to the home, the school, and the church; and we have many homes, many schools, many churches. Our moral universe is polycentric. The state, especially when the most coercive of sanctions is at issue, should not seek to impose a spurious unity upon it.

H. Packer, *The Limits of the Criminal Sanction* 267 (1968). *See also, People v. Onofre,* 51 N.Y.2d 476, 488 n.3, 415 N.E.

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[5] Petitioner argues that by decriminalizing sodomy, the State will be seen as condoning homosexuality and therefore immorality. Petitioner's Brief at 37-38. Yet removing criminal penalties from conduct does not automatically remove long-standing social or moral restrictions. Given the considerable social stigma attached to homosexual conduct, it is unlikely that removal of criminal penalties on private, consensual homosexual conduct will make homosexuality more attractive, or marriage less attractive. *See* H. Packer, *The Limits of the Criminal Sanction* 264-265 (1968).

2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980), *cert. denied* 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 96, 415 A.2d 47, 50 (1980).

In short, the State exceeds the proper bounds of the police power when it acts solely to impose traditional notions of propriety. "There must remain a realm of private morality and immorality which is, in brief, and crude terms, not the law's business." *Wolfenden Report—Report of the Committee on Homosexual Offenses and Prostitution* ¶ 61 (1963). This is particularly true where the only harm of the actions proscribed is repugnance to some members of society. *See* Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A. L. Rev. 581 (1967); Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

When the State imposes criminal sanctions solely to prohibit that which it finds repugnant, it is regulating matters of personal taste. Such matters are beyond State regulation and properly left to the discretion of the individual. For example, in *Cohen v. California*, 403 U.S. 15 (1971), Justice Harlan wrote that the right to speech cannot be curtailed merely because the State, acting as guardian of the public morality, finds a vulgarity to be offensive.

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id. at 25.

Similarly, in an area so personal as private consensual adult sexual conduct the government exceeds its authority when it chooses only certain sexual acts as "proper" for its citizens.

As was asserted at the outset, the issue is not whether there is necessarily a "fundamental" right to engage in homosexual conduct, or indeed in any adult sexual conduct. Rather, the issue is whether the police power of the State may be employed to intrude into intimate relationships and enforce the Legislature's views as to what is proper sexual conduct when that conduct takes place in a secluded, private space such as the home. The desire for moral conformity is not a sufficient justification for the extreme intrusions which result from enforcement of the Georgia statute.

B. The Traditional Disapproval of Homosexuality Is Not A Sufficient State Interest To Justify This Exercise Of The State's Police Power.

In addition to its interest in promoting traditional notions of morality, the State of Georgia justifies its statute on the basis of the historical antipathy towards homosexuals. Petitioner's Brief at 20-23. However, the bare desire to harm an unpopular group is not a legitimate state interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). In *Moreno*, the Court considered legislation which was amended to prevent hippies and hippie communes from participating in the food stamp program. The Court stated:

> "[A] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."

Id. at 534-35 (quoting the opinion of the District Court below, 345 F.Supp. 310, 314 n.11 (D.D.C. 1973)).

Similarly, the Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), struck down a statute providing for incarceration of mentally ill persons, stating:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Id. at 575 (citations omitted).

If public animosity alone is an insufficient State interest to justify deprivation of government benefits or incarceration of the mentally ill, it follows that there must be a stronger rationale than distaste for homosexuals to justify a statute which provides for a prison term up to 20 years for private consensual adult sexual conduct.

In the context of racial prejudice, the Court in *Palmore v. Sidoti*, — U.S. —, 104 S.Ct. 1879, 1882 (1984) stated: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." And, in *City of Cleburne v. Cleburne Living Center*, — U.S. —, 105 S.Ct. 3249 (1985), the Court struck down the application of a municipal zoning ordinance because it "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 3260. This same principle applies to the Georgia statute. The State has no legitimate interest in a statute which, solely on the basis of public distaste or disapproval and without a

showing of harm to a public interest, outlaws private consensual sexual conduct.

Finally, in relying on the traditional condemnation of homosexuality to defend its statute, Georgia ignores the fact that the statute at issue criminalizes the same sexual acts performed by heterosexuals, both married and single. Even if the bald desire to proscribe homosexual conduct were a legitimate state interest, that interest is not rationally advanced by this statute because it criminalizes both heterosexual and homosexual acts. Furthermore, with respect to acts of sodomy committed by married persons, enforcement of this statute violates the "privacy surrounding the marriage relationship" and invades "the sacred precincts of marital bedrooms." *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

III. THE CRIMINAL SANCTION IS AN IMPERMISSIBLE MEANS BY WHICH TO ACCOMPLISH THE STATE'S PURPOSE OF IMPOSING MORAL CONFORMITY ON ITS CITIZENS.

In addition to focusing on the nature of the individual interests at stake and the legitimacy of the State's purpose, the Court must examine the degree to which the State utilizes permissible means to promote a legitimate goal. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974). In this instance, even if the prevention of homosexual conduct were a legitimate state purpose, the use of criminal sanctions is an impermissible means of effectuating that purpose. Enforcement of the statute is not only a gross intrusion upon important liberty interests, but it is an ineffective way of promoting the State's view of morality.

The Georgia statute is virtually unenforceable when applied to consensual adult intimate behavior which takes place in the privacy of the home. By definition, such conduct occurs in a place where it will only rarely be discovered by the State. It involves no victim to report the "crime," and causes no harm which might bring the conduct to the attention of the authorities. In reality, the proscribed conduct can be detected only by objectionable police surveillance techniques. As a consequence, enforcement is at best erratic, and at worst arbitrary and discriminatory. *See* H. Packer, *The Limits of The Criminal Sanction* 304 (1968).

To promote its moral values, the State has available to it a wide variety of means less intrusive upon personal liberty. These include "theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means." *People v. Onofre,* 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980) *cert. denied,* 451 U.S. 987 (1981). In view of the liberty interests at stake, and the unenforceability of the statute, *amici* submit that the use of the criminal sanction in an impermissible means to further the State's interest in moral conformity.

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CONCLUSION

The Georgia statute infringes on the right of Michael Hardwick to determine with whom and how he will experience sexual intimacy. In effect, Georgia has said that even in the home there is no sanctuary for persons who are homosexual. Such persons may never engage in sex-

ual relations, no matter that they take place in a totally private setting, no matter the quality or duration of the relationship involved.

Amici submit that where adult sexual conduct is purely consensual, does not impinge on other members of the public, and does not harm the persons involved, the State's interest in the promotion of traditional morality does not justify imposition of criminal sanctions. As this case demonstrates, the enforcement of such laws requires an impermissible level of government intrusion into the home, as well as into matters so basic and personal as the choice of persons with whom one will be intimate. Georgia has failed to demonstrate a reason why criminalizing such private choices predominates over the individual's interest in maintaining intimate associations in the sanctuary of the home.

For the foregoing reasons, the Georgia statute should be held to be an unconstitutional exercise of the State's police power.

Respectfully submitted,

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